

Exhibit'97"

1 IN THE CIRCUIT COURT OF THE 11th JUDICIAL CIRCUIT
2 IN AND FOR MIAMI-DADE COUNTY, FLORIDA
3 CIRCUIT CIVIL DIVISION

4
5 CASE NO.: 2019-017627-CA-01

6 ROBERT A. SUGARMAN, Individually and as
7 Personal Representative of the Estate of
8 MARILYN WENDY SESKIN,

9 Plaintiff,

10 v.

11 JOHNSON & JOHNSON, JOHNSON & JOHNSON
12 CONSUMER, INC., f/k/a JOHNSON & JOHNSON,
13 CONSUMER COMPANIES, INC., and PUBLIX
14 SUPER MARKETS, INC.,

15 Defendants.
16 _____ /

17 * * *

18 Volume XVI

19 Pages 3665 - 4049

20 * * *

21 Miami-Dade County Courthouse
22 73 West Flagler Street
23 Miami, Florida 33130
24 Friday, March 1, 2024
25 8:38 a.m. - 5:09 p.m.

26 This cause came on for trial before the
27 Honorable William Thomas, Circuit Court Judge, taken

24 by Christine Savoureux-Mariner, FPR and Notary
25 Public in and for the State of Florida at Large.

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1 (Continued from Volume XV.)

2 (Trial proceedings resumed at 8:38 a.m.)

3 THE COURT: All right. Good morning,

4 everyone. Plaintiff is present. Defense is

5 present.

6 We are going to do the jury instructions.

7 You-all can be seated, be comfortable. Let's start

8 where we left off.

9 MR. PENDELL: Your Honor, I do want to let you
10 know that we have withdrawn our express warranty
11 claim. So I know there had been a motion pending
12 and stuff. We are going to let that go.

13 MR. RAYFIELD: Your Honor, I think it would
14 probably make sense to start with legal cause,
15 which we tabled the other day. That's number 8.

16 This is Val Leppert. He is going to be
17 arguing that motion with me.

18 MR. LEPPERT: Good morning, Your Honor.

19 THE COURT: First of all, is this the
20 standard?

21 MR. RAYFIELD: Yes, Your Honor, it is.

22 THE COURT: Okay. And is the red yours?

23 MR. LEPPERT: Yes, Your Honor. We're
24 objecting to the standard instruction or concurrent
25 cause, which the notes make clear should only be

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1 given in cases where the jury could find that the
2 defendants' conduct acted in combination with some
3 other cause.

4 And we cited to Your Honor three cases in the
5 brief we submitted, where there standard
6 instruction was held inappropriate when there is no
7 testimony that the defendants' conduct acted in
8 combination with the other torts. There certainly
9 is testimony here as to alternative risk factors.
10 That's true, just in the cases that we've cited to
11 you, but there is no proffer here, no evidentiary
12 basis to say that the other causes acted in
13 combination with the talc.

14 The plaintiff's specific causation expert,
15 Dr. Chan, disavows that theory. On page 25, 17, of
16 the transcript, he says, in his opinion, the only
17 substantial contributing cause of the injury is the
18 talc.

19 And even on direct examination, Dr. Chan, he
20 goes through all the different risk factors that
21 the defendants have thrown out. And he goes
22 through every of them. I'm happy to go through the
23 transcript in detail. But every one of them, his
24 answer is --

25 THE COURT: But I don't understand. What if

1 there is an argument that, for example, that --
2 because you-all are arguing, or the testimony is,
3 that the hormonal replacement therapy that she had
4 undergone for all these years and how high the
5 levels were. But what if that made her more
6 susceptible to developing the cancer, and then you
7 have this happen, and that just simply -- her
8 actions made her more susceptible, and then the
9 introduction of the baby powder just kind of
10 created an opportunity, okay, for the cancer to
11 grow?

12 MR. LEPPERT: Good question. Had there been
13 testimony that those risk factors, take hormone
14 replacement, acted in combination with the talc,
15 you would be right that this instruction ought to
16 be given. However, that's not what happened here.

17 Our theory of the case is that talc had
18 nothing to do with it, and these other risk
19 factors, one of them, or whatever, is the reason
20 she got this cancer.

21 THE COURT: Why can't the jury conclude
22 that -- what if the jury concludes that they
23 disagree with you, they think that the talc did
24 have a role, but they also think that the hormone

25 replacement therapy also played a role --

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1 MR. LEPPERT: Because the plaintiff's expert
2 denied that theory. Because the plaintiff's expert
3 would have had to come in and say that, would have
4 to say, okay --

5 THE COURT: I disagree. I'm giving -- unless
6 you want to say something else.

7 MR. FAMILONI: No.

8 THE COURT: All right. Thank you.

9 I'm giving the instruction over objection.

10 Number 10, express warranty, you're removing
11 that?

12 MR. PENDELL: We have removed that, Your
13 Honor.

14 THE COURT: I'm assuming there's no objection?

15 MR. PENDELL: They fought me on that, but I
16 convinced them.

17 THE COURT: All right. Number 11, there's no
18 objection.

19 Number 12, we took out, right?

20 MR. RAYFIELD: Well, I should say -- you go

21 ahead.

22 MR. FAMILONI: This is this standard language,
23 Your Honor.

24 THE COURT: But I have an X through it, which
25 means at some point somebody must have told me that

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1 is no longer an issue.

2 MR. FAMILONI: So I think we're going to --
3 because this is an issue they address in their
4 brief that we were going to discuss, but this is
5 actually the standard language from the jury
6 instruction, so I'm not sure how you want to --

7 MR. RAYFIELD: Yeah, I can address that. So
8 this is the one where we struck because it wasn't
9 in their complaint.

10 THE COURT: Okay.

11 MR. RAYFIELD: And now, I'll represent,
12 they've filed a motion to amend the complaint, and
13 we filed an opposition. So they filed a motion to
14 amend the complaint to conform to the evidence.

15 THE COURT: Okay. Well, we are not there yet,
16 so I'm still -- because I haven't ruled on your

17 motion.

18 Number 13, I have a markdown by the very last
19 paragraph. "The product is defective and
20 unreasonably dangerous even if the seller has
21 exercised all possible care in the preparation and
22 sale of the product."

23 Who is objecting to that?

24 MR. LEPPERT: We are, Your Honor.

25 THE COURT: Yes, sir.

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1 MR. LEPPERT: This is not a standard
2 instruction itself. It is, instead, based on the
3 notes to this instruction for 3.7, note 3. And it
4 says that "In cases where strict liability and
5 negligence is submitted together, such an
6 instruction may be warranted."

7 But if we read on in that same note, it says,
8 "If, however, they are submitted concurrently,
9 strict liability and negligence, there is a risk of
10 creating an inconsistent verdict," citing --

11 THE COURT: Well, right now, we don't have
12 strict liability and negligence because they've

13 withdrawn their strict liability claim -- well, no,
14 I'm sorry, they didn't plead strict liability, so
15 right now I haven't granted the motion for leave to
16 amend.

17 MR. LEPPERT: They have pled --

18 MR. FAMILONI: Yes, we have, Your Honor. But
19 also to your point, Your Honor, actually, the way
20 that the cases that they cite read, you actually
21 should wait until after the verdict, because if
22 there is an issue -- if you noted, counsel said
23 "may" -- then the proper way to resolve that is to
24 find out the jury's intent to make sure it's clear
25 to distinguish between -- because their argument is

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1 that this also subsumed.

2 THE COURT: Let me see what you're saying to
3 me. You're saying to me I should submit it to the
4 jury. When the jury comes back and says no to
5 strict liability, but yes to negligence, I then
6 have to send them -- I have to give them an
7 additional instruction, and then I have to go back
8 there and explain something additional to them?

9 MR. FAMILONI: Only to clarify their intent,
10 if that arises.

11 THE COURT: How do I do that?

12 MR. FAMILONI: You can give a clarifying
13 instruction. And that's what --

14 THE COURT: Why should we create a situation
15 where we even have to give a clarifying
16 instruction? Why can't we, in the first instance,
17 anticipate that this is the problem and give an
18 instruction or eliminate an instruction so that we
19 don't create a situation where we have to send the
20 jurors -- they give us their verdict and we send
21 them back there to say, "Explain to us: Your
22 verdict is inconsistent. You have to basically --
23 you can't find this and then find that"?

24 I don't think you deal with that after the
25 fact. I think you deal with that on the front end

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1 so that we don't have to do that.

2 MR. FAMILONI: Your Honor, the secondary
3 language actually clarify the definition of the
4 term "reasonably dangerous" throughout the

5 instructions. It's actually providing more
6 information for the jury, and removing that
7 language puts you at a higher risk of creating
8 issues that wind up being reversed, rather than
9 finding out, while the jury is still within your
10 purview or control, what their actual intent is.
11 That's actually a much cleaner way to go about
12 this.

13 And, in fact, the comment of the case, I'll
14 just refer to it here, the third note, Your Honor.
15 "In cases involving claims of both negligent" --
16 okay, Your Honor, I'll slow down, but in short, it
17 just reaffirms what I'm referring to in terms of
18 this needs to be decided by the jury. I can read
19 the specific language from the case itself that
20 supports that, if you'll indulge me.

21 THE COURT: When you say it needs to be
22 decided by the jury, I understand that. The
23 question is: What do we instruct the jury on so
24 that we can guard against an inconsistent verdict?

25 And I don't think the way to deal with that is

1 to say, "Well, let's wait until they have an
2 inconsistent verdict, because maybe it won't be
3 inconsistent." But, I mean, but what if it is
4 inconsistent? So why can't we instruct them now to
5 avoid an inconsistent verdict?

6 MR. FAMILONI: Well, Your Honor, if you want
7 to instruct them now, while keeping this language,
8 we don't have an issue with that.

9 THE COURT: Why can't we do that? Why can't
10 we keep their language and then just simply tell
11 the jurors, "What this means is that in order for
12 you to return a verdict as to this, you must also
13 do this. You can't return a verdict -- you can't
14 say yes to this and no to this."

15 MR. LEPPERT: Right.

16 MR. FAMILONI: That's perfect, Your Honor.

17 MR. LEPPERT: The issue there is that, first
18 of all, the verdict form that they have proposed is
19 exactly right in the case where that's found to be
20 reversible error, because the jury said yes, up
21 top, on negligence, and then came back no on strict
22 liability, when the claims were based on the --

23 THE COURT: Why can't we tell them they can't
24 do that?

25 MR. FAMILONI: Because, Your Honor, that

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1 situation, that was never cured by the judge. It
2 was never addressed.

3 THE COURT: So why can't we tell them before
4 they go back to deliberate, saying, when we explain
5 the verdict form, we say to them, as I'm explaining
6 to them, and I would say, "Look, if you say yes to
7 this up here" -- in fact, we can even put it in the
8 verdict. We can even say underneath the notations
9 we put, "If you answer yes to this question, you
10 must answer yes to question number 5.

11 If you answer no to this question, you must
12 answer no to question number 5." That way, there
13 should be no inconsistent verdict. The jury would
14 simply say, "We answered yes to this one, so just
15 go down to number 5, hit 'yes.'"

16 MR. LEPPERT: Let me explain why not. If the
17 jury says yes to strict liability, okay, then they
18 have already prevailed on a design theory. There
19 is nothing more. They don't get additional money
20 because they also prevail on the negligence theory.

21 THE COURT: Then I will strike it. If you are

22 correct, then I, as the judge, when I enter the
23 final judgment, I will not enter a final judgment
24 on both strict liability and negligence.

25 MR. LEPPERT: But the issue is that if they

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1 say yes, they've already recovered, which renders
2 the negligence part -- the same claim against
3 negligence is rendered moot. There is nothing left
4 to be done with the claim.

5 The only thing that could happen is if the
6 jury says yes, the negligence doesn't play a role
7 at all. It doesn't add anything anymore. It
8 doesn't add any money damages to it. If the answer
9 is no, they can't answer the negligence question.
10 They cannot answer it.

11 They cannot come back and say, "Oh, the
12 product is not defective" -- under the broader
13 standard, right? This is the broader tort -- "but
14 they were negligent in how they designed it."

15 THE COURT: Okay, but I'm still not
16 understanding. I accept that. What I don't
17 understand is why can't they say yes to both and

18 award -- then proceed with the verdict form, and
19 then when we see yes to both or when we see no to
20 both, because they can say no to both --

21 MR. LEPPERT: Because if they said yes to
22 strict liability, the negligence is a waste of
23 time. Look at the verdict form.

24 THE COURT: Whose time is wasted?

25 MR. LEPPERT: The jury's time. Look on the --

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1 THE COURT: It happens all the time. We set
2 back and -- you are basically almost saying to them
3 that -- and I don't know, maybe the law says this
4 -- "You need to elect which theory you are
5 prosecuting under, and you need to elect that prior
6 to the jury returning a verdict."

7 MR. LEPPERT: Because it's duplicative.

8 THE COURT: So is your issue that, the
9 objection is that, it's duplicative, even if the
10 Court -- not the inconsistent verdict part, because
11 we can cure that, because we can even give an
12 instruction underneath the language that says, "If
13 you answer yes to question number 1, strict

14 liability, you must also answer yes to question
15 number 5."

16 MR. LEPPERT: That's not true. Other way
17 around. If the answer is no --

18 THE COURT: Okay. Whatever the language is,
19 if you answer yes to one, then you answer -- I
20 mean, because the whole point is they can't say yes
21 to one and no to the other, correct?

22 MR. LEPPERT: Right.

23 THE COURT: Okay. So we tell them -- so we
24 give the language, and we tell them that "If you
25 answer no, you must answer --"

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1 MR. LEPPERT: That's it. That's it. But my
2 point would be, if they answer yes, there is no
3 reason to even break their heads about negligence.

4 THE COURT: And there is no reason that I can
5 think of under the law that the case would get
6 reversed simply because they answered yes to both
7 questions or no to both questions. You are just
8 saying, "But, oh, Judge, it's a long verdict form.
9 It's going to take them a while."

10 They've been here for three weeks. So I think
11 they are fine. And, by the way, three weeks and
12 they've asked some very, very probing questions.

13 So I'm going to overrule the objection, and
14 I'm going to give it with the understanding that
15 I'm giving an additional instruction that makes
16 sure -- and you-all can come up with it -- that
17 makes sure the jury understands, so that we avoid
18 an inconsistent verdict, how they have to answer
19 the question.

20 MR. LEPPERT: And also on the verdict form.

21 THE COURT: And also on the verdict form.

22 We'll put that language there as well.

23 MR. LEPPERT: Subject to my objection.

24 THE COURT: Yes, sir.

25 What about up here, there's another red

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1 flag -- who is red, by the way?

2 MR. PENDELL: The plaintiff.

3 THE COURT: The plaintiff.

4 MR. FAMILONI: Actually, Your Honor, that
5 initial is part of the standard jury instruction.

6 THE COURT: It says, sir, here, "or the risk
7 of danger in the design outweighs the benefit."

8 MR. LEPPERT: Right. Correct. And we think
9 this is a consumer product, right? Hence, under
10 the supreme court's decision in Aubin, dealt with
11 asbestos joint compound, you give the consumer
12 expectation test, which is the first part. You see
13 that before you get to red, you see the test that
14 says, "When used --"

15 THE COURT: What was the instruction given in
16 Aubin?

17 MR. LEPPERT: In Aubin, the judge wanted to
18 give the risk-utility test from the third
19 restatement --

20 THE COURT: They are only saying that because
21 you know Aubin was my case. I was the trial judge.

22 MR. LEPPERT: I did not know that, but good to
23 know.

24 THE COURT: Go ahead.

25 MR. LEPPERT: But the point there being that

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1 the Third District thought that the Court should

2 have given the --

3 THE COURT: Third District was reversed.

4 MR. LEPPERT: Correct. And the Third
5 District --

6 THE COURT: What did the Supreme Court say?

7 MR. LEPPERT: The Supreme Court said consumer
8 product equals consumer expectations.

9 THE COURT: Did the Supreme Court reverse and
10 say that there was an error in the trial court
11 giving the instruction?

12 MR. LEPPERT: No. The Third District reversed
13 you.

14 THE COURT: I know. And the Supreme Court
15 reversed the Third.

16 MR. LEPPERT: Exactly. The issue that was
17 decided is that, when it comes to an asbestos
18 product, you use the consumer expectation test,
19 which is the first part of the sentence.

20 The sentence that says, "As safely as an
21 ordinary consumer would expect when used as
22 intended or when used in the manner" -- that is the
23 correct test. The Aubin Supreme Court opinion
24 talks about, "We adhere to consumer expectations.
25 We adhere to consumer expectations."

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1 THE COURT: Here is my question: In the Aubin
2 case, did the trial court give the instruction that
3 included "or the risk of danger in the design
4 outweighs the benefit"?

5 MR. LEPPERT: That, I don't have that in front
6 of me.

7 THE COURT: Well, I want to know that. Did
8 they? Do you know that?

9 MR. FAMILONI: It did not, Your Honor.

10 THE COURT: Okay. So I just wanted it clear.
11 By the way, if I did it then, I would do it again.
12 So if I didn't do it then, now the question is:
13 Why do I give "or the risk of danger in the design
14 outweighs the benefit"?

15 MR. FAMILONI: Your Honor, one reason, as we
16 talked about in the first round of this, we're
17 adhering to the standard jury instructions, and
18 this is part of the standard jury instruction that
19 has been handed to you, if you read the version of
20 it.

21 THE COURT: So is this the standard?

22 MR. LEPPERT: It's an "or." In the standard

23 jury instructions, you have the first test and then
24 an" or," and then all of the sudden, you've got
25 alternative definitions.

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1 But when it comes to an asbestos product like
2 joint compound, here talc, a consumer product, my
3 point is it should be consumer expectations, not
4 risk-utility balancing, because the consumer is the
5 person that matters here. Risk utility, in my
6 opinion, is the right test, is the right choice,
7 from the standard jury instructions, in a product
8 that is sold by a learned intermediary who makes a
9 risk-utility, risk-benefit analysis.

10 In other words, these are alternative
11 definitions, right? Under the jury instructions,
12 there is an "or," right? And the question being
13 is: It depends on the product.

14 And Aubin, in my opinion, is all about
15 consumer expectations, is the way to go. Florida
16 follows consumer expectations. They are not saying
17 you should eliminate the standard jury
18 instructions, because there are some products that

19 are just not sold to consumers, right? Learned
20 intermediary, pharmaceuticals, et cetera, so forth,
21 medical devices. That's when a risk-utility
22 balancing --

23 THE COURT: Do you want to respond?

24 MR. FAMILONI: Yes, Your Honor. The note
25 clearly says, when strict liability and negligence

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1 claims are brought together, to clarify differences
2 between them, and it may be necessary to add
3 language in strict liability instructions to the
4 effect that "a product is defective if unreasonably
5 dangerous, even though the seller has exercised all
6 possible care in preparation of the sale of the
7 product."

8 We are adding necessary language to provide
9 further clarity for the jurors. I'm not sure why
10 opposing counsel is arguing against that further
11 clarity. However, the effect is still the language
12 of the --

13 THE COURT: I'm overruling the objection. I
14 mean, I'm allowing it to stay in. We are going now

15 to -- I put -- number 14, I put an X through it.

16 MR. FAMILONI: Yes, Your Honor.

17 THE COURT: Fifteen, I put an X through it.

18 We are now up to 16, strict liability, failure
19 to warn, and it is: "A product is defective if
20 unreasonably dangerous, even if the seller has
21 exercised" -- what we just said.

22 MR. LEPPERT: You just covered it. It's the
23 same objection --

24 THE COURT: Understood. So your objection is
25 overruled.

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1 MR. LEPPERT: It's duplicative.

2 THE COURT: And it is preserved.

3 What about government rules defense? That's
4 all in red. Who is objecting to that?

5 MR. RAYFIELD: We were objecting to that. We
6 now have an agreed version of that, combining that
7 with something else.

8 THE COURT: I'll put an X, meaning that
9 you-all resolved it.

10 MR. RAYFIELD: We'll get you a new copy.

11 THE COURT: Okay. Nothing on number 18.

12 MR. LEPPERT: Except to make sure that's the
13 point we were objecting to, the duplicative claims.
14 So making the objection that you already said --

15 THE COURT: Where is that at, sir?

16 MR. LEPPERT: The objection is the fact that
17 you shouldn't submit --

18 THE COURT: Tell me what number.

19 MR. LEPPERT: Eighteen.

20 THE COURT: Oh, 18. Okay. Go ahead, I'm
21 sorry. You were saying?

22 MR. LEPPERT: Eighteen, 19, and 20 would be
23 the instruction that we've already handled.

24 THE COURT: Okay. Because you don't think
25 that -- it should be strict liability or

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1 negligence; it shouldn't be both?

2 MR. LEPPERT: Yes.

3 THE COURT: Okay. What about -- nothing as to
4 negligent misrepresentation, number 21. Nothing as
5 to --

6 MR. RAYFIELD: Sorry, Your Honor. So, on 22

7 through 24, we have a directed verdict motion,
8 which you may not want to resolve now, based on the
9 failure to prove reliance.

10 THE COURT: Well, there is no close of all the
11 evidence in the case yet. But you have no
12 objection otherwise to 22, 23, or 24?

13 MR. RAYFIELD: Correct.

14 THE COURT: Okay. But depending on directed
15 verdict, it may change. The instruction may be
16 taken out and not given.

17 What about number 25? It's all red. Is this
18 plaintiff's objection?

19 MR. LEPPERT: No, it's our objection.

20 THE COURT: Okay. It's your objection. And
21 it's legal cause.

22 MR. LEPPERT: Right. We've already instructed
23 on legal cause. The same instruction is already in
24 the case. Remember we just talked about it. You
25 overruled my objection. So this is duplicative now

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1 of giving the another legal cause instruction.

2 THE COURT: Why do we need another legal cause

3 instruction?

4 MR. FAMILONI: Your Honor, this one is
5 actually slightly different, in that it is modified
6 for concealment.

7 THE COURT: Well, why do I need to modify --
8 legal cause is legal cause. What is the
9 difference? What's changed?

10 MR. OLIVER: Your Honor, I know you don't want
11 to hear from two people. May I interject something
12 here?

13 THE COURT: Go ahead.

14 MR. OLIVER: The reason this changed is
15 because, under Naugle, there is language that says,
16 "The statement may get to the hearer through a
17 circuitous route."

18 I think Your Honor is probably familiar with
19 this. You've seen it. So that's why it's in
20 there. We need to make sure the jury understands
21 that there is --

22 THE COURT: Why can't you just argue it? Why
23 does there have to be a jury instruction on it?

24 MR. OLIVER: Well, because it's a complex
25 concept, and I think the jury needs to understand

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1 that that's acceptable.

2 THE COURT: Okay. So what part of this is
3 different from the instruction that we've already
4 given?

5 MR. LEPPERT: The last paragraph.

6 THE COURT: Let me read it.

7 Can I ask: Why can't we just add the last
8 paragraph to the instruction that we've already
9 given?

10 MR. OLIVER: We can do that.

11 MR. LEPPERT: We very much object to that last
12 part. It is a quote taken out of one appellate
13 opinion. There are many great quotes. It is not a
14 standard jury instruction at all.

15 THE COURT: Oh, I'm sorry. You got this from
16 a case?

17 MR. OLIVER: Yeah, we did get that from
18 Naugle.

19 THE COURT: I'm not giving it. You can argue
20 it, but I'm not giving it.

21 And if counsel stands up and then we get an
22 issue as to whether or not what you've argued is
23 the proper statement of the law, then I may have to

24 give some type of instruction to explain to the
25 jurors what the state of the law is, and you would

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3691

1 have to ask me for that; but, otherwise, you can
2 argue the law, but not everything that you want to
3 argue is going to go into the jury instructions.
4 So I'm taking it out.

5 MR. LEPPERT: The next one is number 26. Our
6 proposed instruction and plaintiff's objection.
7 That's what blue means.

8 MR. RAYFIELD: I'll let you read it, Your
9 Honor.

10 THE COURT: It is red here too.

11 MR. RAYFIELD: Correct. So the blue is what
12 we are proposing. The red is they object to this
13 entire instruction.

14 THE COURT: Give me a moment.

15 First of all, can I ask: Is this a standard
16 instruction?

17 MR. RAYFIELD: No.

18 THE COURT: All right. Let me read it with
19 that in mind.

20 All right. What's your objection to the
21 instruction?

22 MR. FAMILONI: Your Honor, honestly, one, it's
23 not standard. That's our primary. Also, we don't
24 see the need for it. However, we've proposed this
25 additional language in the third alternative.

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3692

1 If you decide to include it, we've clarified
2 that legal activity generally. You have your
3 deceptive or fraudulent conduct are not permitted,
4 we want to make sure it is understood that not all
5 acts are covered by the first amendment. But,
6 honestly, Your Honor, we would just object to it
7 because one, it's not a standard --

8 THE COURT: Why do we need this instruction?

9 MR. RAYFIELD: So this is a correct
10 instruction that's often given in tobacco cases
11 where, like in this one, there is extensive
12 evidence of lobbying activities. Under the first
13 amendment, a defendant can't be held liable for
14 petition.

15 THE COURT: You thought there was extensive

16 evidence in this case of lobbying?

17 MR. RAYFIELD: Well, just to give you one
18 example, during Dr. Freidenfelds' testimony --

19 THE COURT: No, no, no, there was testimony,
20 but there wasn't extensive -- I don't remember -- I
21 mean, you-all tried the case, so you-all are much
22 more intimate, but I sat here and listened to it.
23 I don't remember extensive evidence of lobbying.

24 MR. RAYFIELD: I'll back off the word
25 "extensive." There was evidence, though.

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3693

1 THE COURT: Yes.

2 MR. RAYFIELD: And, you know, there was
3 evidence, for example, that, you know, Johnson &
4 Johnson and the FDA were talking to the FDA about
5 testing, about testing related to asbestos. And in
6 a case like that, where there is evidence that gets
7 close to the line in a first amendment violation,
8 courts give this instruction to make sure --

9 THE COURT: That's not this case. I'm not
10 giving this instruction.

11 MR. RAYFIELD: Okay.

12 THE COURT: Number 27, no objection. There is
13 an objection in red on number 28.

14 MR. LEPPERT: Yes. That objection, we are
15 withdrawing.

16 THE COURT: Okay. So there is no objection.

17 MR. LEPPERT: There's one sentence on -- the
18 very last sentence here, medical expenses, on this
19 one; that one, we would agree to the language, but
20 it turns out that no evidence, competent evidence,
21 of the medical expenses came in.

22 THE COURT: Well, I'm assuming you are going
23 to move for a directed verdict. But, otherwise --

24 MR. LEPPERT: Well, we can do it that way. We
25 can do it that way, but it's just that jury

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3694

1 instructions have to be supported by evidence. We
2 can take them now or later, however Your Honor
3 wants to do it.

4 THE COURT: Well, the question is that, unless
5 they stipulate: Do you agree that there's no --

6 MR. PENDELL: There was a stipulation in --
7 what is it? 1001 exhibit, from federal court, that

8 listed the amount of medical expenses.

9 MR. LEPPERT: 6106.

10 MR. PENDELL: 6106. So it's in evidence.

11 THE COURT: Sounds like it is going to be a
12 directed verdict issue.

13 MR. LEPPERT: A directed verdict is not really
14 a claim, but either way.

15 THE COURT: Right. But here is the problem:
16 They are saying there is evidence in the record
17 that supports the complete instruction. You are
18 saying there is no the evidence in the record to
19 support this instruction.

20 MR. LEPPERT: We can take it up now or we can
21 take it up in directed verdict. It doesn't matter.

22 THE COURT: Number 29, mortality tables.
23 Number 30.

24 MR. FAMILONI: Actually, Your Honor, if we
25 could just go back to -- well, I guess we can

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3695

1 address it later, but we have a question about the
2 legal rate, if you are going to determine that.

3 THE COURT: "Including interest at the legal

4 rate, on any amount awarded." What's your interest
5 at the legal rate?

6 MR. FAMILONI: Because we are concerned --

7 THE COURT: I don't remember seeing that
8 language, "legal rate."

9 MR. FAMILONI: It's in the standard. So we
10 are asking: Are you going to determine that and
11 provide that to the jury? Because we don't expect
12 they would be able to calculate or know what that
13 would be.

14 MR. LEPPERT: That's the Court's job.

15 THE COURT: Well, that's my point.

16 MR. FAMILONI: No, I'm not asking for the
17 determination. I'm just confirming that you are
18 going to provide it to them in the event you
19 provide this instruction.

20 THE COURT: I've never done that.

21 MR. LEPPERT: There is a misunderstanding
22 here. The jury will be told that there will be
23 interest, but ultimately the Court would calculate
24 interest.

25 THE COURT: I've never had the jury basically

1 back there with a calculator and adding in -- they
2 are saying, "Okay, I'm going to give you \$100,000
3 at an interest rate of 6.8 percent," and then
4 calculate it out and then write it on the verdict.
5 I, at the end -- if there is a verdict, you
6 calculate it. I ask -- because I don't do the
7 calculations either.

8 You calculate it. I ask them, "Were your
9 calculations correct?" And if they are correct,
10 when I sign the final judgment, I have that
11 interest already in there. But the jury never
12 calculates the interest.

13 MR. FAMILONI: That's just what I was
14 confirming. That's all.

15 THE COURT: But that's why I said I've never
16 given this. So I don't think this should be in
17 here.

18 MR. PENDELL: So, Your Honor, it should end
19 after "services" and the red part, just out?

20 THE COURT: Correct.

21 MR. PENDELL: Okay. Thank you.

22 MR. LEPPERT: All right. Judge, one more
23 objection to 29. I think we skipped past it.

24 THE COURT: There is no objection listed.

25 That's why we skipped past it.

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3697

1 MR. LEPPERT: The objection now is that I
2 think, to my knowledge, the mortality tables, which
3 is the subject of this instruction, were not
4 introduced. That's my understanding. The
5 mortality tables were not introduced to the jury.
6 If they are not in, we shouldn't have an
7 instruction on mortality tables.

8 MR. FAMILONI: Your Honor --

9 THE COURT: I don't remember any introduction
10 of mortality tables either. And I'm assuming the
11 mortality tables are the mortality tables as it
12 relates to Mr. Sugarman?

13 MR. LEPPERT: Both.

14 MR. PENDELL: Your Honor, they are correct. I
15 agree, this can probably go.

16 THE COURT: Okay. It's gone.

17 Number 30, no reduction.

18 MR. FAMILONI: Yes. This is our proposed
19 instruction, Your Honor. This is just saying that
20 we don't think any -- there is no relevance to his

21 dating life, in terms of the damages.

22 We don't think any mention of that should be
23 considered. If you want me to go into greater
24 detail, I can. But I think, on the face of it --

25 THE COURT: First of all, is this a standard

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3698

1 instruction? Something tells me it's not.

2 MR. FAMILONI: It's not. However, Your Honor,
3 the case law, one, is incredibly important on this
4 area, right, because we don't want him to be
5 prejudiced because of the fact that he's now in a
6 new relationship. Mr. Sugarman testified during
7 this trial that his wife cannot be replaced. The
8 fact he is in a new relationship does not replace
9 his wife.

10 And then going further down the line to the
11 loss of companionship, services, his new partner
12 does not replace that in any way, shape, or form.
13 In offering any evidence or information regarding
14 that could tend the jury to reduce his damages
15 because they feel like that void has been filled,
16 when the reality is that he testified that is not a

17 possibility. The two are completely separate and
18 distinct.

19 THE COURT: Well, I'm not even sure what
20 Mr. Sugarman's damages are, in terms of as it
21 relates to the loss of his wife. I don't know what
22 you are going to argue. So I think it depends what
23 you are going to stand up there and argue.

24 Because if there is an emotional component of
25 his damages, meaning "She was my everything," and,

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3699

1 you know, "This is how we built our lives, and this
2 is the hole that has been left," and then there is
3 this other person, who has not replaced her, but
4 somebody who has aided in his healing, so that the
5 emotional loss is not as severe. That doesn't mean
6 that anybody replaces anybody. It just means that
7 "This is the person who has helped me to
8 emotionally heal."

9 Well, maybe if they were going to give you,
10 let's say, a billion dollars, they would instead
11 maybe give you -- because there's been some healing
12 and it hasn't been as dramatic, why can't that they

13 take that into consideration?

14 MR. FAMILONI: Because, Your Honor, there is
15 no relevance to it. Because, although I understand
16 what you're saying, in terms of maybe this person
17 assisted in the overall healing process, that's
18 contrary to what he offered on the stand in this
19 case. Nothing can replace her. Nothing can help.
20 He was crying throughout trial consistently. He
21 still wears her wedding ring on his pinky. Nobody
22 can satisfy --

23 THE COURT: That's your argument. And that's
24 your position. Why can't they argue inferentially
25 that the emotional toll that he has -- and, by the

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3700

1 way, his emotional breakdown on the witness stand,
2 okay, I mean, he loved somebody; he lost somebody.
3 Anytime you talk about that, you basically have to
4 relive it. That's a very difficult thing to do,
5 and nobody is undermining that.

6 But you seem to be suggesting that everybody
7 has to accept that emotional loss without even
8 referencing how he has basically helped to heal his

9 emotional pain. How can a jury award him for
10 emotional pain without considering whether or
11 not -- the full extent of the emotional pain?

12 MR. FAMILONI: Your Honor, no testimony was
13 provided that his new partner helped him heal.
14 There is no evidence whatsoever to support that
15 conclusion.

16 THE COURT: Well, can't they argue that
17 inferentially just by the simple fact that he has a
18 new parter, somebody that he -- doesn't he live
19 with this person now?

20 MR. FAMILONI: He now does. Yeah. So that
21 inference is one too many, Your Honor, I would
22 argue. You are asking them to make several
23 inferences about this relationship that they heard
24 nothing about.

25 THE COURT: Let me hear what their objection

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3701

1 is.

2 MR. RAYFIELD: Telling the jury to do
3 something directly contrary to your motion in
4 limine ruling. They moved before trial to exclude

5 any evidence about Mr. Sugarman's romantic
6 relationships after Dr. Seskin's death.

7 You denied the motion, and you specifically
8 said what you're saying now, is that it bears on,
9 quote, "what damages you are asking for." This
10 instruction just tells them ignore that ruling;
11 it's a nonstandard instruction.

12 THE COURT: I'm not giving it. I'm striking
13 it. Over objection.

14 MR. FAMILONI: Yes, Your Honor. Would it
15 provide you comfort that other cases in this
16 circuit and in Florida have also excluded
17 information such as this?

18 THE COURT: No. Meaning would it change my
19 mind?

20 MR. FAMILONI: Yes.

21 THE COURT: It would not.

22 Number 31, punitive damages. There is no
23 objection. Oh, I'm sorry, there is one, number 2,
24 on page -- there is no page.

25 MR. LEPPERT: Obviously, there is the

1 overarching issue that we have a pending motion on
2 punitive damages.

3 THE COURT: But, otherwise, does this
4 instruction properly state the law?

5 MR. FAMILONI: Yes.

6 MR. LEPPERT: Okay. As to 2, it is a standard
7 jury instruction where you see the red language.

8 THE COURT: Yes.

9 MR. LEPPERT: It is a standard jury
10 instruction. We object, though, however, that
11 financial resources, as a matter of due process,
12 can be used to assess punitive damages against a
13 defendant. The wealth of defendant matters.

14 I think the second part of it is there if the
15 defendant wants basically to say, "Don't bankrupt
16 us." And so we don't want the second part. I
17 mean, in other words, the second part --

18 THE COURT: Why do you care whether or not
19 they want -- really, defendants' argument just
20 simply says, "But you can't award an amount that's
21 going to financially destroy the defendant, Johnson
22 & Johnson."

23 MR. FAMILONI: Your Honor, honestly, in much
24 as my chagrin for your last ruling, I admire your
25 consistency in terms of adhering to the whole

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3703

1 provided instruction. So I would just say be
2 consistent. The Florida standard jury instruction
3 requires --

4 THE COURT: There is a standard?

5 MR. FAMILONI: It is a standard. They've
6 already conceded the point.

7 MR. LEPPERT: Hang on. This is something for
8 the defendant to elect.

9 THE COURT: Does the instruction say that?

10 MR. LEPPERT: Let me double-check before I
11 speak out of turn.

12 THE COURT: Okay.

13 MR. LEPPERT: Let me double-check on that.
14 The point being is, obviously, it is designed to
15 protect the defendant against financial ruin.

16 THE COURT: I don't know why you or the
17 plaintiff would really have an objection to the
18 instruction. I mean, because your work has already
19 been put into the record. Wasn't it 350 billion?

20 MR. OLIVER: 377.

21 MR. LEPPERT: Our concern is this talks about

22 financial destruction. The problem with financial
23 destruction is that's not the issue, in light of
24 the --

25 THE COURT: But you're asking -- it's a

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3704

1 standard instruction, so if it's a standard
2 instruction, I'm inclined to give it, because I
3 don't think you go wrong when you give standard
4 instructions in these cases.

5 MR. LEPPERT: Hang on. So it says right
6 here -- it's in bracket. Not a standard
7 instruction. It's in bracket. So subsection B
8 says, "The financial resources of defendant."

9 Okay. And then down at the bottom, there is,
10 in bracketed language, that says "However, you may
11 not award an amount that would financially destroy
12 the defendants."

13 MR. RAYFIELD: Yeah, and then the note to 5 --
14 oh, sorry. The note says, "This instruction is to
15 be given when requested by the defendant."

16 THE COURT: Okay. I won't give it. I don't
17 think it matters one way or the other, to be honest

18 with you. They don't want it.

19 Then I have number 32, which appears to be all
20 in blue. So that means --

21 MR. LEPPERT: It's our instruction, their
22 objection.

23 THE COURT: You are objecting?

24 MR. PENDELL: Your Honor, this is the State
25 Farm instruction. And if you recall, over the

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3705

1 course of trial, they tried to have this inserted
2 previously, and you said, "I've seen this in
3 tobacco cases. I reject this."

4 THE COURT: Give me a moment.

5 First of all, is this a standard instruction?

6 MR. LEPPERT: No, it is not a standard
7 instruction. But hang on. Philip Morris v.
8 Williams says that a jury must be instructed. It
9 cannot punish the defendant for harm suffered by
10 nonparties. That is a crystal-clear holding.

11 Philip Morris versus Cohen, a Florida case,
12 holds that such an instruction must be given. Harm
13 to others cannot be used to punish the defendant.

14 In every punitive damages case Your Honor has had
15 with me in tobacco cases, you have given an
16 instruction on harm to others cannot be the basis
17 for it. It is the principle conduct that you
18 cannot harm -- that you cannot not punish a
19 defendant for harm suffered by nonparty. The jury
20 has to be instructed on the principles of that.

21 MR. OLIVER: Your Honor, under Philip Morris
22 v. Williams, the Supreme Court said -- either that
23 or State Farm, the cases they cited. And I don't
24 know if this is in the other part of the
25 instruction. It did say you can consider harm to

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3706

1 others for the purposes of evaluating
2 reprehensibility of defendants' conduct.

3 And so while we object to this, it's
4 nonstandard, we don't think it should be given at
5 all. If it is given, it should certainly that you
6 may consider harm to others, in terms of
7 reprehensibility, but you cannot punish them -- you
8 have to punish them for things that happened
9 directly to Marilyn Seskin.

10 That's how I would modify if I was to give it.

11 I wouldn't give it. We still object. And it's
12 nonstandard. So I think it shouldn't be in, but
13 that is --

14 THE COURT: Can they consider your actions as
15 it relates to reprehensibility in regards to
16 others?

17 MR. LEPPERT: It can be relevant to
18 reprehensibility to conduct. That is true.

19 THE COURT: Why can't we say that?

20 MR. LEPPERT: We're waiting on their addition.
21 I mean, if they --

22 THE COURT: I'll give the instruction, add in
23 the language that you suggested. You-all can work
24 on that. And then it should work out.

25 Okay. So it's going to be modified. And

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3707

1 everything else is the concluding instructions,
2 which should all be -- there are no objections to
3 it.

4 Let's talk about the verdict form. Now, it's
5 all in red. Tell me what that means. Oh, because

6 you gave one in blue.

7 MR. LEPPERT: We have one in blue, one in red.

8 We met and conferred, tried to reach further
9 resolution; unable to find further resolution.

10 THE COURT: Let's look at it.

11 MR. PENDELL: Your Honor, our verdict form has
12 been shortened.

13 THE COURT: You changed it?

14 MR. PENDELL: Because we dropped the claim.

15 THE COURT: Are you going to give it to me?

16 MR. PENDELL: Giving it to you. Your Honor,
17 may I approach?

18 THE COURT: I don't need the whole thing. I
19 just need the instructions. Thank you.

20 Let's start with the first question. I don't
21 even know if either one of your questions should be
22 what it should say. The plaintiff says -- I think
23 it's the plaintiff -- red is plaintiff?

24 MR. PENDELL: Correct.

25 THE COURT: Okay. The plaintiffs say, "Were

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3708

1 the defendants negligent?"

2 The defendants says, "Was Marilyn Seskin's use
3 of Johnson's Baby Powder the legal cause of her
4 cancer?"

5 I think it should probably say -- by the way,
6 you are okay with lumping all three of the
7 defendants together for the purposes of this
8 question?

9 MR. LEPPERT: The way we have it phrased
10 eliminates that problem.

11 THE COURT: But I don't like the way you have
12 it phrased. So that's my question, is: Do you
13 have a problem -- this is what I propose it should
14 say: "Was -- do you find, by the greater weight of
15 the evidence, that the defendants' product, or
16 Johnson's Baby Powder, was the legal cause of
17 injury to Marilyn Seskin, yes or no?"

18 MR. LEPPERT: That sounds good. That sounds
19 right.

20 THE COURT: Plaintiff?

21 MR. PENDELL: One second, Your Honor.

22 Your Honor, instead of legal cause, how about
23 substantial contributing cause, which is actually
24 what legal cause means?

25 MR. LEPPERT: Standard verdict form in the

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3709

1 model instructions were legal cause.

2 THE COURT: And, yeah, I've never modified
3 that. I think it should say legal cause, and you
4 explain what all legal cause means, meaning you
5 will tell them that it's the legal cause if it
6 substantially contributes.

7 I don't think I need to say in the verdict
8 form, "Legal cause means substantially contribute."
9 I think that's your job when you are arguing to the
10 jury to explain it.

11 MR. PENDELL: Okay.

12 THE COURT: And I'm going to give the
13 instruction that says legal cause includes
14 substantially contributing.

15 MR. PENDELL: Fair enough, Your Honor.

16 THE COURT: All right. So the first
17 question -- I don't know if anybody is taking down
18 what I'm saying. I don't know if I can say it
19 again.

20 But it should say -- and, by the way, did the
21 plaintiffs prove by the greater weight of the
22 evidence that the defendants' actions were the

23 legal cause of --

24 MR. LEPPERT: Product.

25 THE COURT: Product.

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3710

1 -- product was the legal cause of injury to

2 Marilyn Seskin?

3 And then the second question would be -- I

4 don't understand. What's the purpose for number 2?

5 MR. PENDELL: Well, based on Your Honor's

6 ruling for number 1, I don't think that question 2

7 is applicable anymore.

8 THE COURT: Okay.

9 MR. PENDELL: I think your question answers

10 both of these questions.

11 THE COURT: And then number 3. Well,

12 sometimes I think it's also better to label on the

13 verdict form what you -- like, if you want to say,

14 like, negligence, and then the next one, you want

15 to say product defect or strict liability, and then

16 another one you say -- it just helps the jury, I

17 think.

18 MR. LEPPERT: Especially if we have to give

19 the instruction, "Do not answer this question if
20 you say no --"

21 MR. PENDELL: We have no objection to that.

22 THE COURT: Okay. So the next question is --
23 so question, which would be your number 3, is that
24 the defective product?

25 MR. PENDELL: Correct.

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1 THE COURT: So that would be your number 2?

2 MR. LEPPERT: Correct. And I think strict
3 liability design defect should go first because
4 it's the broader tort, right? That's how we avoid
5 the inconsistent verdict. It would be inconsistent
6 the other way around, but if the jury says no on
7 strict liability design defect --

8 THE COURT: Do you have an issue with which
9 one goes first? I don't know why it matters.

10 MR. OLIVER: We don't care. If they want
11 strict liability to go first --

12 THE COURT: Okay. So the first question
13 should be --

14 MR. LEPPERT: It's the second question. We

15 already have question 1.

16 THE COURT: Was the talc -- I'm sorry.

17 I guess they propose: "Was talc-based
18 Johnson's Baby Powder in an unreasonably dangerous
19 condition?"

20 You say, "Was Johnson's Baby Powder defective
21 in design or in the warnings, and if so, was that
22 defect the legal cause of Marilyn Seskin's cancer?"

23 I think I'm more inclined to go with the
24 defense's. The defense's says, "Was Johnson's Baby
25 Powder defective in design or in warnings, and if

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1 so, was that defect the legal cause of Marilyn
2 Seskin's cancer?"

3 MR. PENDELL: We agree, Your Honor.

4 MR. LEPPERT: And below that, we would need an
5 instruction that says, "If your answer to this
6 question is no, please do not answer --"

7 THE COURT: So that would be question number
8 1. The defense's question number 2 would be
9 question number 1. And then the question number 1
10 would be the negligence -- I mean, question number

11 2 would be the negligence?

12 MR. PENDELL: Correct.

13 MR. OLIVER: And I just want to understand
14 what Val said. They are saying that because of the
15 discussion we had earlier, if they answered no to
16 number 1, it would say, "Then don't answer number
17 2," because number 2 is subsumed within the --

18 THE COURT: No, that's not what I said I would
19 give. I would say, "If you answer yes to question
20 number 1, you must also yes to question number 2."

21 MR. OLIVER: Yes, yes.

22 THE COURT: I'm not saying, "Ignore question
23 number 2."

24 MR. OLIVER: Got it. Got it. Got it.

25 THE COURT: I know they want me to say that,

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3713

1 but I didn't say that's what I was going to say.

2 MR. OLIVER: That's what I meant. I got it,
3 Judge.

4 THE COURT: Okay. The third question, which I
5 guess is your fourth question, is: "Was the
6 unreasonably dangerous condition of the defendants'

7 talc-based Johnson's Baby Powder a substantial
8 contributing cause?"

9 MR. LEPPERT: Got that covered.

10 MR. OLIVER: By the earlier question.

11 MR. RAYFIELD: Got that covered.

12 THE COURT: So we don't need that?

13 MR. OLIVER: I believe the way Your Honor -- I
14 don't have it written down, but I believe the way
15 that Your Honor proposed the first question, that
16 that would be subsumed within --

17 THE COURT: So we don't need that.

18 MR. LEPPERT: Correct.

19 THE COURT: So your number 3 is -- when I say
20 "yours," the defendants: "Was Johnson & Johnson
21 negligent in designing or the warning of the baby
22 powder" -- I'm sorry.

23 "Was Johnson & Johnson negligent in designing
24 or warning of the baby powder, and if so, was that
25 negligence the legal cause of Marilyn Seskin's

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3714

1 cancer?"

2 MR. OLIVER: I would say you wouldn't need to

3 ask it that way, because if we're going with the
4 theory we've gone with before with that first
5 question, that handles legal cause for all design
6 defects.

7 THE COURT: I agree.

8 MR. RAYFIELD: The first question that you
9 proposed only asks whether the product was the
10 cause. But you still need an independent causation
11 question about whether the negligence was the
12 cause.

13 THE COURT: No, you don't. It's all in the
14 same question. It says -- I don't have it with me.
15 You wrote it down or something.

16 MR. LEPPERT: We do, but there is a
17 distinction between the product causing injury and
18 negligence causing injury. That's the distinction
19 here.

20 THE COURT: Okay. So if you are saying to
21 me -- but isn't question number 2 -- there is going
22 to be one for strict liability, and then there is
23 going to be one for negligence.

24 The question for negligence is whether or not
25 the greater weight of the evidence shows that the

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3715

1 product was the legal cause of injury, to Marilyn
2 Seskin's injury.

3 MR. LEPPERT: That's right.

4 THE COURT: Okay. How is that any different
5 than --

6 MR. LEPPERT: He wants to eliminate the
7 causation part of that.

8 MR. OLIVER: No, that's false. That's false.

9 So if I understand correctly where we are,
10 Your Honor, what they want to do, and what is often
11 done in tobacco cases, is the request for two
12 causation.

13 THE COURT: If you are going to do that, then
14 I'll just revert back to the plaintiff's question,
15 is: "Were they negligent?" And I'll leave it that
16 simple.

17 I'll just simply say, "Were they negligent?"
18 Because negligence consumes all the elements. So I
19 can simply just say to the jury, "Did the
20 plaintiffs prove, by the greater weight of the
21 evidence, that the defendants were negligent?"

22 MR. LEPPERT: Correct.

23 THE COURT: And we could just leave -- the

24 jury is going to be instructed as to what
25 negligence is, as to all the elements. And that

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1 way, I don't need to have causation, because
2 causation is subsumed in "Were they negligent?"

3 MR. LEPPERT: The model verdict form clearly
4 has both elements in the same question, which is
5 what we have proposed. And that is negligence,
6 which was a legal cause. That is in the standard
7 model.

8 THE COURT: So we can say that.

9 MR. LEPPERT: That's what I'm saying. That's
10 what we have. We are all good.

11 THE COURT: No, no. The second question
12 should be: "Did the plaintiffs prove by the
13 greater weight of the evidence that the defendants
14 were negligent" -- or I'm sorry -- "that the
15 defendants' product was negligent and the legal
16 cause of injury to Marilyn Seskin?"

17 MR. LEPPERT: Correct. That sounds right.
18 But before that, we have the same question as to
19 strict liability, right, and before that, we have

20 the question that Your Honor artfully phrased --

21 THE COURT: So then we don't need to say, "Was
22 Johnson & Johnson negligent in designing and
23 warning" -- I'm sorry. Well, yeah, we don't need
24 number 3, your number 3.

25 MR. LEPPERT: We do need number 3, yes. We

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1 need a question on whether we were negligent, and
2 if so, that negligence was the legal cause. In the
3 standard jury instruction, it really has negligence
4 and then cause in the same question.

5 THE COURT: One juror called. They are
6 running late. Okay.

7 MR. OLIVER: Again, Your Honor, I think that
8 that doubles our burden in proving causation twice.
9 In a negligent design claim, which is what we have
10 here, once we prove that the product itself was a
11 legal cause of our harm, and then we go to the
12 conduct element, which is the second part here,
13 it's just "Were they negligent?"

14 At that point, the jury has already said that
15 the product caused it, right, and the question is:

16 "Well, were they negligent in designing that?" If
17 they were, we've already got causation. You don't
18 have to ask it twice.

19 THE COURT: I agree.

20 MR. LEPPERT: Again, they are a separate
21 inquiry. Whether the product caused harm, they
22 certainly have to prove that. We all know it.
23 There is no claim, period, if the product didn't
24 cause the harm, right? There is no point in going
25 through every other count that they have if the

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1 answer to the first question is no.

2 However, comma, they also have to prove that
3 negligent conduct was the legal cause, which is why
4 the standard jury instruction, or the model verdict
5 form, has the question: "Was there negligence,
6 which was a legal cause?"

7 THE COURT: Let me pull up a previous
8 instruction that I've used. Maybe a jury
9 instruction in the Aubin case. Something else was
10 going on in Aubin, because that verdict form really
11 was just about damages. I don't see the -- I

12 pulled up the verdict form in Aubin --

13 MR. LEPPERT: To simplify the process, maybe,
14 we are fine if we give the very first question that
15 Your Honor carefully designed, right, that says
16 they have to prove that the product was the legal
17 cause of the injury, as the Court phrased it. And
18 then we go strict liability design defect, yes or
19 no, right, and then negligence.

20 There has to be an instruction: "If the
21 answer was yes, don't go to negligence." Then we
22 have negligence, yes or no, right, and so on.

23 In other words, without waiving my objection,
24 that seems to be the better alternative out of
25 everything that's been proposed.

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1 THE COURT: You keep saying that. And I don't
2 know where you got that from, but I never said that
3 I was going to tell the jurors, parenthetically,
4 that if they answer yes to question number 1, they
5 have to answer no to question number 2. What I
6 said is that, "To avoid an inconsistent verdict, if
7 you answer yes to 1, you also have to answer yes to

8 2."

9 MR. LEPPERT: That would be incorrect, because
10 the point is a product can be --

11 THE COURT: Then I am not going to direct the
12 verdict for -- you have to pick your poison.

13 Either the jurors just answer the question and we
14 don't tell them, direct them, to answer yes or no
15 to either one, or -- and we run the risk of there
16 is an inconsistent verdict, and we deal with it
17 once we get the inconsistent verdict, or-- but I
18 am not going to tell the jurors, "If you answer yes
19 to question number 1, you have to answer no to
20 question number 2." I'm not doing that.

21 MR. LEPPERT: No, we are saying to skip it.
22 If the answer is no to strict liability --

23 THE COURT: Why can't they answer it?

24 MR. LEPPERT: Okay, but then -- because they
25 cannot then come back and say yes on negligence as

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1 a matter of law.

2 THE COURT: No, they can't recover on
3 negligence. It doesn't mean the jury can't say

4 yes.

5 MR. LEPPERT: It would be an inconsistent
6 verdict in the three published cases.

7 THE COURT: I'm sorry, are you telling me if
8 they say yes as to strict liability and yes as to
9 negligence --

10 MR. LEPPERT: I'm not saying -- I don't have a
11 problem with that at all. That's not what the
12 instruction would say. That would be permissible.
13 The instruction wouldn't say that.

14 The instruction would simply say, "If your
15 answer to that question was no, skip the negligence
16 question." If the answer is yes, you've already
17 said, "I'm allowing them to consider the negligence
18 question as well."

19 I think that's duplicative. You overruled me
20 on that. The inconsistent verdict happens only if
21 the jury says no to one of the claims and yes to
22 the other. So the only thing that we would need to
23 do --

24 THE COURT: So why can't we just simply tell
25 them that "If you answer yes to one, you must also

1 answer yes to the other"?

2 MR. LEPPERT: Because that wouldn't be right.

3 That particular part wouldn't be right. There is a
4 scenario, there is a world there, where a defendant
5 is liable for strict liability, but not negligent.
6 Strict liability is broader.

7 That's why they are asking for this
8 instruction; that you can be strictly liable even
9 though you exercised all possible care. Remember
10 that little instruction that they want to add?
11 That's exactly the point of that instruction.
12 There is a world where you are liable for strict
13 liability, right, under the broader theory, but you
14 wouldn't be liable under negligence.

15 THE COURT: So what we would need to instruct
16 the jury is, is that -- because can't the jury --
17 like, if they say no to one, you are saying that
18 they could find yes to the other?

19 MR. LEPPERT: If the answer to strict
20 liability is no, it can't possibly be yes to
21 negligence.

22 MR. OLIVER: At this point, I would need to
23 see what questions we are talking about to even
24 engage on that, but I don't think that's accurate.

25 And I'm not sure that it's inconsistent.

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1 I mean, the jury can find that defendants were
2 negligent, they can find they are strictly liable,
3 and I'm not sure why that's even inconsistent.

4 THE COURT: Yeah, why is it -- let's assume
5 that your scenario plays forward. Let's say the
6 jury says -- the jury answers yes to strict
7 liability and they say no to negligence.

8 MR. LEPPERT: Wouldn't be an inconsistent
9 verdict.

10 THE COURT: Let's say they say yes to strict
11 liability and yes to negligence.

12 MR. LEPPERT: Would not be inconsistent.

13 THE COURT: Let's say they say no to strict
14 liability and yes to negligence.

15 MR. LEPPERT: Inconsistent verdict.

16 THE COURT: All right. The question is
17 that -- can't I, then, throw out the verdict?
18 Meaning, if you're saying that's the law, then
19 can't I, after the fact, say it's inconsistent and
20 throw it out?

21 MR. LEPPERT: You could, but as you noted
22 earlier, emphatically, "I should instruct them on
23 the front end not to enter something that would be
24 inconsistent."

25 THE COURT: But the problem is that the

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1 instruction on the front end is being becoming
2 complicated. And I think it's easier for me to
3 simply say, if they come back and say no to strict
4 liability but yes to negligence, and the law is
5 what you say the law is, then I simply throw it
6 out. And I simply say it's not an enforceable
7 verdict because it's inconsistent with the law.

8 MR. LEPPERT: But why provoke it? That was
9 exactly what we said earlier. Why provoke it? Why
10 provoke the possibility?

11 THE COURT: Because I think it got
12 complicated, and I don't like getting complicated.
13 And so I don't see the harm to anybody if, in fact,
14 the jury comes back -- and we're all hypothetically
15 speaking. If the jury comes back in the manner
16 that creates the inconsistency, then that's the

17 whole purpose of the trial court, is to say this
18 verdict is inconsistent.

19 By the way, I don't have to send the jury back
20 into the jury room and say, "Why did you find no
21 strict liability but yes as to negligence?" All I
22 simply have to do is enter a final judgment in
23 favor of the defendant on the issue of strict
24 liability -- I'm sorry, as to both strict liability
25 and negligence.

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1 MR. LEPPERT: All it would take is one
2 sentence. Hang on.

3 THE COURT: No. Would you please stop telling
4 me to hang on.

5 MR. LEPPERT: I'm sorry.

6 THE COURT: It's improper to say that to the
7 Court. This is the third time you've said it.
8 Along with the hand going up. That's improper.

9 MR. LEPPERT: I apologize.

10 THE COURT: Okay. And I'm done having the
11 conversation. So I'm not giving it. I'm going to
12 allow the jury to decide the issues, and if it's

13 inconsistent, we'll deal with it.

14 The next one is -- I'm on the defendants'.

15 And I don't know if your number 4 is their number
16 5, but their number 4 says, "Was LTL Management
17 negligent in designing?"

18 MR. OLIVER: Your Honor, we would obviously
19 object to that because this case has been tried
20 against the defendants, but that also is incorrect
21 or at least misleading to the jury, because it's in
22 the -- I believe the parties agreed to it. It
23 says, "LTL is responsible for the acts of JJCI."
24 So I think it should just be defendants.

25 THE COURT: They don't have any problem with

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1 that. And I thought we had talked about that
2 before, when we said we would just list the
3 defendants together.

4 MR. OLIVER: Yeah, yeah.

5 THE COURT: All right. So we don't need their
6 number 4.

7 But your number 5 says, "Did the defendants
8 fail to warn Marilyn Seskin about the risks

9 associated with the use of talc-based Johnson's
10 Baby Powder?"

11 MR. OLIVER: I think that's subsumed by the
12 first question Your Honor is going to give.

13 THE COURT: So we don't need number 5.

14 MR. OLIVER: Yeah.

15 THE COURT: Your number 5 is -- I'm just going
16 back and forth because I don't know they align.
17 The defense's number 5 says, "Did Marilyn Seskin
18 rely, to her detriment, on any statement of
19 material fact intentionally made by Johnson &
20 Johnson or LTL Management that misrepresented the
21 safety of Johnson's Baby Powder, and if so, was
22 that reliance the legal cause of Marilyn Seskin's
23 cancer?"

24 That goes to what claim?

25 MR. OLIVER: That goes to the fraud claim,

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1 Your Honor.

2 THE COURT: But do you have an instruction for
3 the fraud?

4 MR. OLIVER: We do have an instruction for the

5 fraud.

6 THE COURT: Number 7?

7 MR. OLIVER: Yes.

8 THE COURT: So we don't need your number 6.

9 MR. OLIVER: No, because that would be
10 subsumed, I believe, by the Court's decision on
11 number 1.

12 THE COURT: Okay. So your instruction says,
13 "Did the defendants conceal or admit a material
14 fact or facts about talc-based Johnson's Baby
15 Powder?"

16 MR. OLIVER: Your Honor, what I would say
17 about our 7 and 8 their number 5: So they've
18 combined all the elements into one question, which
19 I'm fine with, but I would prefer the language of
20 our question.

21 In other words, "Did the defendants conceal or
22 admit a material fact or fact about talc-based
23 Johnson's Baby Powder, and was that -- was the
24 defendants' concealment or omission a substantially
25 contributing cause or a legal cause of Marilyn

1 Seskin's cancer?" In other words, if you put our 7
2 and 8 together into one question, and modify that 8
3 a little, I'd be fine with that. It's essentially
4 the same thing they say. It's just worded slightly
5 differently.

6 MR. LEPPERT: The only distinction -- we are
7 talking past each other -- their 7 and 8 deals with
8 the omissions claim and so forth. Our 5 would be
9 the affirmative misrepresentations claim. But
10 other than that, what we just said is right. It's
11 a different claim. Our 6 deals with the
12 misrepresentation claim.

13 THE COURT: No, your 5.

14 MR. LEPPERT: I'm sorry. Our 5 deals with the
15 misrepresentation claim. The questions that we
16 just looked at over on the plaintiff's side are
17 dealing with the concealment/omission claim. So,
18 in other words --

19 THE COURT: So they are saying that there's
20 two. There's the omission claim and then the
21 concealment claim. I mean, misrepresentation. You
22 deal with the conceal and/or omit, and you don't
23 deal with the misrepresentation, I think is their
24 argument. They want an instruction also including
25 the misrepresentation.

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1 MR. OLIVER: So, in other words, they want two
2 questions. One on what I said, the concealment or
3 omission, and one on --

4 THE COURT: Don't you have two causes of
5 action?

6 MR. OLIVER: I believe we do, Your Honor.

7 THE COURT: Okay. So I think they need to be
8 instructed as to --

9 MR. OLIVER: Sure. No, I don't disagree with
10 that. I'm trying to find --

11 THE COURT: So you-all don't seem to have much
12 of a disagreement, except that they want a
13 misrepresentation and then you can have your
14 conceal or omit.

15 MR. LEPPERT: The only difference is that they
16 do not have an individual concealment claim against
17 any defendant. They do have a misrepresentation
18 claim, which is why this is question 5 on ours.
19 They don't have an individual concealment claim.
20 They have a conspiracy claim, which we have a
21 question on.

22 MR. OLIVER: Right. We got confused in there,
23 Judge. I thought that was the case, and then you
24 guys got me believing we pled something else.
25 I do know about the concealment claim and how

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1 that's evolved in Florida; and so if you gave our
2 instruction on 7 and 8 combined, which is what they
3 want, a combination, I'm fine with that being the
4 fraud and concealment, because it's fraudulent
5 concealment, and I agree you have to have a
6 statement or statements.

7 I mean, we all agree on that. That's the law.
8 And if you just put those together, 7 and 8, I
9 don't have a problem with that. I'm not sure --
10 the conspiracy claim is obviously a separate claim.

11 MR. LEPPERT: May we confer and come up with
12 one fraud question that would simplify it?

13 MR. OLIVER: Well, you can't come up with one
14 fraud question when the conspiracy claim --

15 MR. LEPPERT: Well, that's a separate claim
16 that you have pled. They have to have -- of
17 course, we have pending motions on it.

18 THE COURT: Okay. The difference is, is that
19 you told me -- the defense told me that there was a
20 fraudulent misrepresentation claims that is pled,
21 but there is no concealment claim pled.

22 MR. OLIVER: I don't think that's accurate. I
23 think that the concealment claim, I think it's
24 called fraudulent misrepresentation or concealment.
25 I don't have the complaint in front of me. But

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1 clearly what is pled in the allegations is both
2 misstatements and concealment, and I'm fine having
3 one question for that claim.

4 MR. RAYFIELD: I would respectfully disagree
5 with that. I don't think that their complaint --
6 which I don't have with me. I'd check, but I've
7 read it carefully -- does not have a straight-up
8 concealment claim.

9 They have a misrepresentation claim, both
10 under negligence and fraudulent misrepresentation,
11 and they have a conspiracy to conceal claim, but
12 they don't have what is often in the tobacco cases,
13 concealment, regular concealment.

14 THE COURT: Well, not what they called it, but
15 did the allegation -- because clearly -- I mean,
16 clearly, that was what was tried. Concealment was
17 tried. It wasn't just misrepresentation;
18 concealment was tried in this courtroom.

19 So even if they didn't -- I mean, I don't know
20 if they did or they didn't. They seem to believe
21 that they did. But certainly this case was about
22 concealment.

23 MR. OLIVER: I can't tell you the title we put
24 on our complaint. I don't remember. But that's
25 what we pled.

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1 THE COURT: And I'm inclined to give an
2 instruction, and to the extent that it's not
3 pled -- and I don't know if it has or has not been
4 pled, but it certainly has been tried in this
5 courtroom. So I will give a concealment
6 instruction. So you-all work together; maybe
7 combine their 7 and 8 with whatever you all have in
8 your 5.

9 Let me make sure our jurors are here. Let's

10 just take a couple more minutes and see where we
11 are.

12 I don't understand your number 9. This is
13 about statements.

14 Plaintiff.

15 MR. OLIVER: Do you have the one that got rid
16 of the express warranty claim?

17 MR. LEPPERT: That is out.

18 THE COURT: And their number 9 looks like
19 it's -- it's their number 7. You both have one on
20 here.

21 Your number 9 says, "Did the defendants make a
22 statement or statements of material fact about
23 talc-based Johnson's Baby Powder that they knew or
24 should have known was false?"

25 Their number seven 7, "Did Marilyn Seskin

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1 rely, to her detriment, on any statement of
2 material fact that was made in furtherance of
3 Johnson & Johnson' product agreement to conceal or
4 omit --"

5 MR. OLIVER: That's their conspiracy

6 instruction, whereas 13 was our false statements
7 instruction. So I think our -- well, I guess what
8 you're looking at is 9. I think the statement you
9 read from us has been subsumed by --

10 THE COURT: Okay. What about your 10?

11 MR. RAYFIELD: I think they've withdrawn 9
12 through --

13 MR. OLIVER: We did. That's express warranty.

14 MR. RAYFIELD: They've withdrawn 9 through 12.

15 MR. PENDELL: The copy he has, has that
16 withdrawn.

17 MR. RAYFIELD: Okay. I didn't realize.

18 THE COURT: Okay. So then the next thing
19 is -- the next one is the conspiracy? Because I
20 don't see an instruction on your conspiracy count.

21 MR. RAYFIELD: What I have is their 16, is,
22 "Did the defendants agree or --"

23 THE COURT: I don't have a 16.

24 MR. OLIVER: You are looking at 11 on ours,
25 right, 11 and 12? That would be the conspiracy

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1 claim?

2 THE COURT: Yes.

3 MR. OLIVER: Okay. Yes, that's our
4 conspiracy.

5 THE COURT: Let me stop you. But the 9 and 10
6 on the one you gave me, are they out?

7 MR. OLIVER: I was a little confused with
8 where we went last time with the fraudulent
9 concealment. I will say that I am fine submitting
10 one fraud claim to the jury. I think we need a
11 negligent misrepresentation claim because that
12 would be different. But the --

13 THE COURT: Okay. So which one is negligent
14 misrepresentation?

15 MR. LEPPERT: That would be our 6.

16 THE COURT: So you would have 7 and 8 on
17 fraud. You-all will combine it and work on the
18 language. And then you-all can look at number 6
19 and see if you agree with their number 6 or how
20 that may need to be modified?

21 MR. OLIVER: Yes, we can do that. And the
22 concealment question is going to be basically be
23 the same --

24 THE COURT: I don't want to go back there.

25 Let's go now to your number 11.

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1 MR. OLIVER: The conspiracy question is
2 basically going to be the same, Judge.

3 Val, you agree with that, right?

4 I mean, the misrepresentation claim we pled is
5 basically going to be worded the same, except
6 including conspiracy.

7 THE COURT: So their number 6 is your number
8 11? I'm sorry, their number 7 is your number 11?

9 MR. OLIVER: Their number 7 would be our
10 number 11 and 12. And I guess we are going with
11 the form where we combine them all together, and
12 that's fine.

13 MR. LEPPERT: We'll work it out.

14 THE COURT: And then the next one is just the
15 issue of damages. That's your number 13, their
16 number 12?

17 MR. OLIVER: Yes. I would put --
18 traditionally, you put allocation of fault after
19 damages. So they've put allocation of fault first.
20 I would put damages first and then -- because they
21 don't need to ask -- they don't need to put an
22 allocation of fault if they don't give any damages,

23 right?

24 MR. LEPPERT: And, also, the allocation of
25 fault has been mooted, right, because we said,

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1 basically, right, we are not going to distinguish
2 between Johnson & Johnson an LTL.

3 THE COURT: Well, they have an issue for
4 punitive damages that we haven't resolved.

5 MR. OLIVER: I think we have to do that.

6 THE COURT: Well, you say we resolved it, but
7 they say we haven't. So let's just put it this
8 way: You are correct, let's put damages first, and
9 then we'll put the percentage of fault that you
10 assign to each of the individuals, and then they
11 can just sign and date.

12 So you-all have some conversations that
13 you-all have to engage in to get this to some
14 finality, and we'll take it up again after we get
15 all the evidence in, I guess.

16 MR. OLIVER: And do you want an update from
17 the parties? Ms. Brown and I had spoken at length
18 last night, and we came up with some information --

19 THE COURT: It's your case. You-all know that
20 if the jury doesn't get the case today, it's a
21 mistrial. So that's totally up to you.

22 And when I say "get the case," that means that
23 we have completed closing arguments and the only
24 thing the jurors have to do is deliberate. And if
25 you-all fail in that, then it's a mistrial. If you

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1 don't -- and, by the way, you take as much time or
2 as little time. It doesn't even matter to me. I'm
3 just here. I call the witnesses in, as I think we
4 should do now.

5 The jury is coming in.

6 (The jury enters the courtroom.)

7 THE COURT: Sir, thank you.

8 You-all can be seated. Be comfortable,
9 please.

10 All right. For the record, all of our jurors
11 are present. All the parties are present.

12 Did any of you have a conversation with anyone
13 concerning this case?

14 JURORS: No, Your Honor.

15 THE COURT: Did anyone do any independent
16 research about the case?

17 JURORS: No, Your Honor.

18 THE COURT: The witness is on the witness
19 stand, still under oath.

20 You may continue your direct examination.

21 MS. DILOMBI: Thank you, Your Honor. May it
22 please the Court.

23 DIRECT EXAMINATION

24 BY MS. DILOMBI:

25 Q Good morning, Dr. Boyd.

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1 A Good morning.

2 Q We've excised much of this, so hopefully we
3 can get you on and off here.

4 All right. So, yesterday, you told the jury
5 that ovarian and primary peritoneal cancers are genetic
6 diseases that result from mutations in genes, right?

7 Do you remember that testimony?

8 A Correct, yes.

9 Q Can these mutations be caused by the years and
10 years of what our bodies do every day, ordinary cell

11 replication that is necessary for life?

12 A Yes, that's, in fact, the most likely
13 explanation for how these mutations occur and accumulate
14 over a lifetime. If you think about the human lifetime,
15 it begins with a fertilized egg.

16 The egg divides trillions of times to develop
17 ultimately into an adult human being. And as a matter
18 of information, an adult human has trillions of cells in
19 their body. And the division doesn't stop there. It
20 continues throughout a lifetime.

21 All of our organs are constantly dividing, in
22 terms of cell division and cell replication and so
23 forth. So mutations are a natural byproduct of
24 trillions of cell divisions. Every time a parent cell
25 divides into two daughter cells, there are 3 billion

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1 elements of the human genome in every cell; 3 billion
2 letters with base pairs, if you will --

3 MS. O'DELL: Your Honor, object to the
4 narrative.

5 THE COURT: Overruled.

6 THE WITNESS: And these 3 billion base pairs

7 must be faithfully replicated in order for the two
8 daughter cells to be viable daughter cells of the
9 parental cell.

10 BY MS. DILOMBI:

11 Q Okay. Were you done with your answer?

12 A Yeah, I think that's sufficient.

13 Q Okay. Are these ordinary cell replication
14 errors called sporadic mutations? And then, if so,
15 would you explain what that is.

16 A Yes. Sporadic mutation is simply a mutation
17 that occurs during the process of cell division in any
18 particular organ of the body, as opposed to an inherited
19 mutation, which would be, as we discussed, inherited
20 from one or the other parent.

21 Q Did you prepare an animation slide to assist
22 the jury in understanding how these sporadic mutations
23 that all of us have going on every day lead to cancer?

24 A Yes, I did.

25 Q Okay. And using the animation, would you be

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1 able to explain how the sporadic mutations lead to
2 cancer?

3 A Yes.

4 Q All right.

5 MS. DIOLOMBI: So if we could put that up,
6 please, John. I think it's Slides 11, 12, and 13.

7 BY MS. DIOLOMBI:

8 Q Would it help you to get down and talk us
9 through what we are about to see?

10 A Sure. Happy to do it.

11 MS. DIOLOMBI: Your Honor, may he?

12 THE COURT: Yes.

13 MS. DIOLOMBI: Thank you.

14 MS. O'DELL: Your Honor, may I just see the
15 slides in advance? I'm just now seeing --

16 MS. DIOLOMBI: I gave you the whole stack.

17 MS. O'DELL: No objection.

18 BY MS. DIOLOMBI:

19 Q All right. Dr. Boyd, if you would walk up
20 there and just walk us through what we're seeing there,
21 and then let me know when we need me to move or have
22 John move to the next slide, please.

23 A So this is basically the process of DNA
24 replication, which corresponds directly with the process
25 of cell division. So here we have the cell. This is

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1 the nucleus containing the genetic material, the DNA
2 here inside the nucleus.

3 And over on the right side of the slide, you
4 see a very, very small section of the human genome, a
5 double helical structure. This is the structure of DNA.
6 So these letters are base pairs coupled with each other:
7 G couples with C, vice versa; A couples with T, and vice
8 versa.

9 And next slide, please.

10 And so the process of DNA replication involves
11 the unwinding of the DNA double helix into two single
12 strands, which are then replicated. And so now we have
13 two sets of DNA that will constitute the genetic
14 complement of the two daughter cells.

15 And, again, you can see, with faithful DNA
16 replication, you always have G and C paired with each
17 other and you always have A and T paired with each
18 other. This is the normal, the robust process, of DNA
19 replication.

20 Next, please.

21 And occasionally, as I've suggested, when
22 you're replicating -- again, this is a single cell
23 dividing into two cells, or two cells dividing into four

24 cells. There are 3 billion pairs of these pairs in a
25 single cell that must be faithfully replicated in order

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3741

1 for the human to maintain viability. And so errors are
2 naturally going to occur, just by chance.

3 I think that a good analogy may be just
4 probability. Driving to the grocery store, you are less
5 likely to be involved in a car accident, as opposed to
6 driving across the United States. It's just pure
7 statistical probability. The more cell divisions occur,
8 the more base pairs, the more likely there is just
9 randomly an error to occur.

10 Next, please.

11 So here, we see A properly pairing with T, but
12 when C pairs with T, when it should normally be paired
13 with a G, the red box here indicates that a mutation has
14 occurred, by definition. C should not be paired with T.
15 That is, by definition, a mutation that has occurred
16 during the DNA replication process.

17 I think we are done.

18 Q Okay. And how does that process relate to the
19 aging process?

20 A Well, as I suggested earlier, in the very
21 earliest stages of human development, a single
22 fertilized egg dividing trillions of times to ultimately
23 generate an adult, our cells in our bodies continue to
24 divide. Cells in your colon continue to divide. Cells
25 in the uterus continue to divide. Cells in every bodily

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3742

1 organ, perhaps with the exception of the brain, where
2 the cellular complement is relatively fixed.

3 As we age, more cell divisions occur, more DNA
4 replication occurs. And it's probably self-evident that
5 the more cell divisions that occur over a lifetime, the
6 more DNA replication processes that occur during a
7 lifetime, the greater the probability of errors and for
8 mutations to occur and to accumulate.

9 And so it's a natural byproduct of aging that
10 cancer is, thus, in essence, a disease of older age.
11 That's why cancer is more common in a 65 year-old than
12 it is in a four year-old. That's just a very simple
13 product of random chance and the number of cell
14 divisions and cell replications that must occur.

15 The analogy of going to the grocery store as

16 opposed to driving from Miami to California. It's a
17 longer trip. It's a long trip. Greater the probability
18 of a car accident the longer you drive; the greater
19 probability of cancer the longer you live. It's a
20 disease of aging because of this.

21 Q Are there any tests -- shifting just a little,
22 are there any tests that doctors can run for early
23 detection of ovarian cancer?

24 A No, there are none at this point in time,
25 unfortunately.

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3743

1 Q Before diving into your next opinion about
2 cell studies, can you please overview for the jury the
3 three types of studies that scientist may perform to
4 investigate and effect an outcome.

5 A Yes. Whenever you're attempting to address a
6 hypothesis related to cause and effect, an exposure and
7 a physiologic or a biologic outcome, and a biological
8 system, in this case, a human, there are three systems
9 that may be used for study, and you start with the
10 simplest, which is what we refer to as cell studies.

11 Cells in culture; cells in a petri dish. The

12 second stage being animal studies to further the
13 findings that you may have done in cells in culture.

14 And, finally, you attempt to generate evidence
15 in humans, often through epidemiologic studies, because,
16 you know, clearly it's much more problematic conducting
17 experiments, other than in a clinical trial context with
18 drugs and so forth in humans. But those are the three
19 stages of testing a biological hypothesis.

20 Q Would I be right that cell studies are just
21 preliminary, and then you take the next steps to have
22 the animal studies, and, if ethical or capable of doing,
23 then you do human studies?

24 A Yeah, cell studies are in and of themselves
25 generally very insufficient to draw any major

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3744

1 conclusions about cause and effect with respect to
2 exposure to anything.

3 Q Now, to make sure we are on the same page,
4 Dr. Boyd, let's take a look at the second opinion you
5 described to the jury yesterday.

6 MS. DILOMBI: John, if we could put that back
7 up.

8 BY MS. DILOMBI:

9 Q Now, let's talk in more detail about cell
10 studies. Have there been studies of looking at the
11 effect of talc, asbestos, and fibrous talc by exposing
12 them to ovarian and other cells?

13 A Yes.

14 Q Have you performed types of cell studies over
15 the course of your career?

16 A Yes, I've performed many cell studies, not,
17 mind you, on talc or asbestos, but in other contexts,
18 yes.

19 Q And just, again, very briefly, to orient us
20 about what we are going to talk about, just, again,
21 briefly describe what the cell studies are.

22 A So cells are taken from animals or humans.
23 It's very easy to do. And separated and placed in
24 what's known as a monolayer, a single layer of cells.
25 Think of, again, the analogy of tiles on a

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3745

1 kitchen floor. A monolayer, a single layer of cells on
2 the bottom of a plastic dish. And fluid, cell culture
3 medium, is placed on top of those cells, with nutrients,

4 vitamins and so forth to keep the cells alive and
5 growing and happy for some period of time. And those
6 are cultured cells.

7 The petri dish is then placed in an incubator
8 that provides humidity at 98.6 degrees temperature to
9 simulate the body, and then the cells are manipulated in
10 some fashion to test the hypothesis under the study.

11 Q We are going to walk through a couple of the
12 cell studies that plaintiff's experts have relied upon
13 in reaching their opinions.

14 MS. DILOLOMBI: John, you can take that slide
15 down for me, please.

16 BY MS. DILOLOMBI:

17 Q But I want to focus you on just two of those
18 studies, if I may.

19 MS. DILOLOMBI: I'm going to give plaintiff's
20 counsel a copy of each of these, and they are not
21 going into evidence. Just for discussion.

22 Your Honor, may I approach the witness?

23 THE COURT: You may.

24 BY MS. DILOLOMBI:

25 Q So two of the studies we are going to talk

1 about is the Shukla study and the Buz'Zard.

2 A That's correct.

3 Q Okay. I'll give you Shukla first, then
4 Buz'Zard. Let me ask you about these studies. We are
5 going to talk about them more specifically, but have you
6 reviewed those studies in reaching your opinions in this
7 case?

8 A Yes, I have.

9 Q Did you prepare slides to assist the jury in
10 summarizing these three studies that we will discuss in
11 more detail now?

12 A I did.

13 Q So the first study relied on by plaintiff's
14 experts is a study by -- well, one of them -- is Shukla,
15 from 2009, called "Alterations in gene expression in
16 human mesothelial cells correlate with mineral
17 pathogenicity."

18 First of all, did this study show that talc
19 and asbestos caused ovarian cancer?

20 A No.

21 Q Did the Shukla study look at human mesothelial
22 and pleural mesothelial cells from the lung, as well as
23 human ovarian epithelial cells?

24 A Yes, Shukla and colleagues did.

25 Q And as to the mesothelial and ovarian cells,

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1 were they something called immortalized cells?

2 A Yes. It's important to recognize that when
3 one takes cells, in this case, from animal or human,
4 places them in culture, as we've just described, the
5 cells are very unhappy. They'd like to be back at home
6 in the organism from whence they were derived. And so
7 they typically just die very quickly in culture, even
8 though you go to great efforts to keep them alive with
9 culture medium and so forth.

10 And so as a matter of, for lack of a better
11 term, convenience, experimental convenience, one
12 typically exposes the cells to a cancer-causing virus,
13 SB40, for example, Simian Virus 40, which causes cancer
14 in apes, primates, and the cells are thus partially
15 transformed into cancerous cells. They are not
16 cancerous cells yet, but they are immortalized.

17 One of the characteristics of a cancer cell is
18 it is relatively immortal. It keeps dividing
19 indefinitely, as you can imagine.

20 And so it's important recognize that these

21 studies were performed on these not neoplastic, not
22 cancerous, but partially transformed, partially
23 neoplastic cells. So they are no longer normal cells,
24 in other words.

25 Q And as to this study and other cell studies we

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3748

1 are going to talk about, were the reactions the authors
2 reported something called gene expression and
3 self-proliferation as opposed to cell mutations or cells
4 becoming cancerous?

5 A Yes, that's correct.

6 Q What's gene expression?

7 A So we've talked about genes being the essence
8 of heredity, either at the human level or at the
9 cellular level, DNA. I like to think of DNA as -- using
10 a house, perhaps as an analogy. DNA is the blueprint,
11 and RNA and proteins are the bricks and mortar that
12 correspond to the blueprint.

13 And it's the bricks and doors and windows and
14 so forth that make a house a house. And so gene
15 expression must occur in order for the DNA in the cell
16 to make a liver a liver or a pancreas a pancreas, or a

17 breast a breast, because all cells in the human body
18 have the same complement of genes.

19 The same 22,500 genes are present in every
20 cell in the body, regardless of what organ system those
21 genes and those cells are in. And so RNA and protein
22 levels must go up or down, be expressed, in other words,
23 in order to translate the blueprint into a liver or a
24 brain or a breast. That's gene expression.

25 Q What can gene expression tell you in a cell

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3749

1 study?

2 A Very little, in terms of cancer development.

3 Q Why not? Why does it tell you very little?

4 A Because cancer, as we've discussed several
5 times, is a genetic disease. It's -- the beginning and
6 end of cancer is the acquisition and accumulation of
7 genetic mutations, not the expression of genes going up
8 or down.

9 Q And in terms of cell proliferation, what is it
10 and what can it tell you in a cell study?

11 A It can tell you that the cells are dividing,
12 period.

13 Q That's it?

14 A That's it.

15 Q Okay. Did the Shukla study find any cancerous
16 changes in the mesothelial and ovarian cells treated
17 with talc or asbestos?

18 A No.

19 Q Did these results show that talc or asbestos
20 caused ovarian cells to become cancerous?

21 A No, they did not.

22 MS. DILOMBI: Can you put up that opinion,
23 please, for me, John.

24 BY MS. DILOMBI:

25 Q And so that just summarizes what you've said

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3750

1 to the jury, correct?

2 A Just reading it, yes, that's fair.

3 Q All right. So let's then look at the next
4 study, and the next study is the Buz'Zard study.

5 You got that?

6 A Uh-huh.

7 Q All right. Did that study look at something
8 called reactive oxygen species in two types of cells,

9 ovarian epithelial cells and ovarian stromal cells?

10 A Yes.

11 Q Were the cells used in this study also
12 immortalized, as you previously discussed?

13 A Yes, they were, in exactly the same way, using
14 the SB40 tumor virus to transform them from normal cells
15 into immortal cells.

16 Q Okay. So same issues and concerns about using
17 immortalized cells in these types of studies, same with
18 the Buz'Zard study?

19 A Yes.

20 Q Broadly speaking, what did this Buz'Zard study
21 show as to reactive oxygen species?

22 A Well, remarkably, it's hard to know what was
23 in the minds of Buz'Zard and Law, which were the two
24 coauthors of this particular paper. But reactive oxygen
25 species actually went down, in terms of the quantity of

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1 reactive oxygen species, after exposure to talc.

2 Q Was this any indication that talc is
3 carcinogenic to cells?

4 A No, not at all.

5 Q Did this study show any carcinogenic changes
6 to cells?

7 A No.

8 MS. DILOMBI: And can we put up the opinion
9 summary, please, John.

10 BY MS. DILOMBI:

11 Q And so does that summarize your opinions as to
12 the Buz'Zard study for the jury?

13 A Yes, and it's also important to recognize here
14 that in addition to talc reducing reactive oxygen
15 species, as I've suggested, there were no remarkable
16 changes in cell proliferation either, leading to my
17 conclusion that there were no carcinogenic changes
18 observed in these cells.

19 Q Another study I want to touch on is a study by
20 Wylie from 1997. I have a copy for counsel and for you.

21 MS. DILOMBI: Your Honor, may I approach?

22 THE COURT: You may.

23 BY MS. DILOMBI:

24 Q So this one is a study by the lead author,
25 A.G. Wylie, "Mineralogical Features Associated with

1 Cytotoxic and Proliferative Effects of Fibrous Talc and
2 Asbestos on Rodent Tracheal Epithelial and Pleural
3 Mesothelial Cells," right? Is that what we're looking
4 at?

5 A Yes. The hamster, in other words, yes, and
6 rat. Both of which are rodents, for the record.

7 Q Did this study involve immortalized cells as
8 well?

9 A Yes.

10 Q Did the Wylie study show that either fibrous
11 talc or asbestos caused carcinogenic changes in the
12 cells studied?

13 A No.

14 Q Okay. And did you prepare a slide summarizing
15 your opinion on the Wylie study?

16 A Yes, I did.

17 MS. DILOMBI: John, if you could put that up.

18 BY MS. DILOMBI:

19 Q And does this summarize your opinions as to
20 this Wylie study?

21 MS. O'DELL: Objection, Your Honor, leading.

22 THE COURT: Overruled.

23 THE WITNESS: This is a slide that I prepared
24 summarizing my interpretation of the paper, which,
25 as I said, hamster tracheal epithelial cells and

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1 rat pleural mesothelial cells, but not ovarian
2 cells, were tested here, both with respect to
3 exposure to asbestos and fibrous talc, and no
4 cancerous changes were shown in response to those
5 exposures in these cells.

6 BY MS. DILOMBI:

7 Q Now, let's talk about two other studies that
8 undergird the opinions of plaintiff's experts in this
9 case. Their two studies are by a Dr. Saed.

10 Are you familiar with the two cell studies
11 published by Dr. Saed involving talc?

12 A Yes, I am.

13 Q Let me grab those.

14 MS. DILOMBI: May I approach, Your Honor?

15 THE COURT: You may.

16 BY MS. DILOMBI:

17 Q So the first study, if you just read off that
18 title for the first study.

19 A Sure. "Molecular basis" -- let's see, this
20 is --

21 Q So "Molecular basis supporting the association

22 of talcum powder use with increased risk of ovarian
23 cancer" would be the first one.

24 A Yes, just in chronological order.

25 Q Okay. And then the second one we'll talk

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1 about is "Talcum powder induces malignant transformation
2 in normal human primary ovarian epithelial cells."

3 A Correct, yes.

4 Q All right. Let's look at those.

5 Do these studies relied on by plaintiff's
6 experts in any way show that talc can cause ovarian
7 cancer?

8 A No, they do not.

9 Q In fact, is there any relevant information
10 these studies provide at all regarding the effects of
11 exposing talc to cells?

12 A Certainly not in the context of cancer, no.

13 Q All right. So let's turn to that 2019 study
14 briefly, where he actually applied talc to cells. And
15 tell us about that.

16 A So in this particular study, it's a very
17 complicated study, but they looked at a number of end

18 points, including genetic and gene expression and self-
19 proliferation and so forth and some of the things we've
20 talked about. They looked at cancer marker known as
21 CA125, which is typically used to look at recurrence or
22 disease progression in ovarian cancer. And none of
23 these findings were consistent with the role of talc in
24 initiating a carcinogenic process in the immortalized
25 epithelial cells that were used in the study.

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1 But not only were the cells used in the study
2 immortalized, but he also actually used cancerous cells.
3 In other words, human ovarian cancer cells. Three
4 different cancer cell lines in the study, which was
5 rather remarkable, if you are trying to show a
6 carcinogenic process, to begin with cancer cells. So
7 there were a number of -- that's the basic outline of
8 the study.

9 But in terms of study design data
10 interpretation and conclusions drawn from this study,
11 all three were egregiously flawed, in terms of reaching
12 a conclusion that's outlined in the title. There is no
13 molecular basis of anything associated with an increased

14 risk of ovarian cancer shown in this study.

15 Q And would you tell our jury: Were there a
16 number of design flaws in the study that made the
17 results essentially meaningless?

18 A Yes. I touched on a few. One was
19 inappropriate cells used in the study. You can't use
20 cancer cells to show that you are converting a normal
21 cell to a cancer cell.

22 They actually dissolve the talcum powder in an
23 organic solvent known as DMSO, dimethyl sulfoxide, which
24 is a very reactive chemical solvent that has the ability
25 to change the properties of materials dissolved in the

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1 solvent. It actually has very profound effects when
2 exposed to cells themselves, in terms of the cell
3 membrane.

4 So inappropriate vehicle, inappropriate cells
5 used in the study, inappropriate study design. He is
6 confusing preexisting genetic variations in the human
7 genome with the introduction of mutations, which is a
8 very egregious misunderstanding of human genetics and
9 genetic mutation, and the conclusions, as I've

10 suggested.

11 Q Were proper control experiments performed in
12 this 2019 study?

13 A No.

14 Q Did Dr. Saed test relevant cell lines for
15 ovarian cancer?

16 A No. As we've suggested.

17 Q And do you have a slide summarizing your
18 opinions as to the study design flaws?

19 A Yes, I do.

20 MS. DIOLOMBI: If we could put that up, John.

21 BY MS. DIOLOMBI:

22 Q And so does this summarize your opinions as to
23 the study design flaws of Dr. Saed's 2019 study we are
24 looking at called "Molecular Basis Supporting the
25 Association of Talcum Powder Use with Increased Risk of

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1 Ovarian Cancer"?

2 A Yes. And I would like to point out that one
3 additional design flaw I found in this study was the
4 fact that he used an enormously high dose of talc, and
5 the way that he and his colleagues arrived at this dose

6 was to start with a dose of talcum powder at the
7 beginning of the study, which was actually so high that
8 it was toxic to the cells, it killed the cells, and then
9 the investigators worked backwards until they found a
10 dose that didn't kill the cells.

11 And this is the dose that they used to perform
12 the study, as opposed to the correct way to conduct such
13 a study, in terms of exposing cells to some substance.
14 You're wishing to look at the effect of -- you would
15 start at a very low dose, where you saw nothing, and
16 then gradually work up higher and higher until you saw
17 an effect, as opposed to starting with a dose that
18 simply kills the cells and working backwards.

19 So that's, in sum, my conclusion of the major
20 study design flaws in this particular case.

21 Q And what was the dose he bombarded those cells
22 with?

23 A I can look it up. It's basically an amount of
24 talcum powder that you could literally see.

25 Q Like 500 milligrams; would that refresh your

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1 recollection?

2 A Half a gram, yeah. I mean, you can -- if you
3 can see an amount of talcum powder in your hand that you
4 are exposing to a very small number of cells in a petri
5 dish, it stands to reason that this is a ridiculously
6 high dose, yes.

7 Q So he was just saturating the cells with talc?

8 A Yes, to the extent that the talc didn't kill
9 the cells, since he had worked backwards from a dose
10 that did, in fact, kill the cells.

11 Q Was this a relevant dose to use in an
12 experiment like this?

13 A No, not at all.

14 Q Based on this high dosage what, if anything,
15 are you able to conclude from Dr. Saed's study?

16 A Well, he certainly hasn't shown that talcum
17 powder increased the risk of ovarian cancer, and,
18 furthermore, he most certainly didn't provide the
19 molecular basis supporting the association of talcum
20 powder with ovarian cancer, because there was no
21 exposure.

22 Q In addition to the study itself, were you able
23 to review Dr. Saed's actual notebooks and study data for
24 this study, as well as read his testimony about these
25 studies?

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1 A Yes, unfortunately, I was compelled to study a
2 very large number of laboratory notebooks associated
3 with the study.

4 Q And, in your opinion, did you find problems in
5 his notebooks and the underlying study data?

6 A Yes. Numerous.

7 Q Okay. Can you highlight some of those
8 problems for the jury. Tell us, were there deleted
9 pages from the study?

10 A Yes. I can work through them quickly, just
11 giving you some examples.

12 Q Well, do we have a slide that summarizes --

13 A I did prepare a slide that summarizes this.

14 MS. DILOMBI: John, if you could put up
15 Dr. Boyd's slide.

16 BY MS. DILOMBI:

17 Q And just quickly walk us through the errors.

18 A Yes. Pages were deleted. Instead of simply
19 crossing through lines in a laboratory notebook, which
20 is standard laboratory practice, the investigators used
21 Wite-Out to, well, literally white-out data or
22 information, white-out page numbers, and write over the

23 Wite-Out different information or different page

24 numbers.

25 Datasets were literally taped over with other

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1 datasets cut out from some other section of the notebook

2 or some other computer printout and so forth.

3 Calculations and figures in the data notebooks literally

4 did not match the data that were actually presented in

5 the paper that was produced from the data in these

6 laboratory notebooks. And there were several flaws or

7 mistakes in arithmetic, in terms of adding up numbers

8 and generating mean values that were always in favor of

9 Dr. Saed's hypothesis, which I found troubling.

10 Q So just basic plus, addition, errors in the

11 notebooks, in terms of coming up with the numbers?

12 A Yes. You add up three numbers and you get an

13 average, and the average was not correct, but the

14 average number that was generated favored the theory

15 that was being investigated. It wasn't random.

16 Q Let's talk briefly about Dr. Saed trying to

17 get the study published.

18 Are you aware whether the manuscript for the

19 study was originally submitted to the journal

20 Gynecologic Oncology?

21 A I am.

22 Q Did Gynecologic Oncology accept or reject

23 Dr. Saed's paper?

24 A They rejected it, and I'll use the term

25 outright.

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1 Q Why?

2 A Because typically when one submits a

3 scientific publication or a clinical publication for

4 peer review, to a peer-reviewed journal, expert --

5 anonymous experts are -- peer-reviewers are asked to

6 review the paper and provide constructive criticism that

7 allows the authors to improve the paper.

8 So they may suggest simple revisions in how

9 the conclusions are stated, for example. They may

10 suggest additional experiments. They suggest ways to

11 improve the paper to make it a more robust study.

12 And in this case, the peer-reviewers found the

13 flaws to be so egregious that they simply did not invite

14 a revised version of the paper and rejected the paper

15 outright. That's the reason I use that term. They
16 didn't invite a revised resubmission.

17 Q Give me one second.

18 Based on the feedback from Gynecologic
19 Oncology, was Dr. Saed's paper fixable?

20 A Well, the managing editor certainly didn't
21 believe so, because he or she said in a courteous
22 fashion that "We are not -- your paper has been
23 rejected, and we are not inviting a resubmission."

24 Q If you go to page 9, did the paper include a
25 declaration of conflicting interest?

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1 I'm sorry. Let me just ask it. It's okay.

2 Let me just ask it.

3 Is there a declaration of conflicting interest
4 on page 9 of the document?

5 MS. O'DELL: Which exhibit?

6 MS. DILOMBI: The first one, the 2019 Saed
7 study. It's page 9.

8 THE WITNESS: Yes, there is a declaration of
9 conflicting interest.

10 BY MS. DILOMBI:

11 Q And could you read that declaration for us.

12 A "The authors declare the following potential
13 conflicts of interest with respect to the research,
14 authorship, and/or publication of this article:
15 Dr. Saed has served as a paid consultant and expert
16 witness in the talcum powder litigation."

17 Q Did Gynecologic Oncology allow Dr. Saed to try
18 again and resubmit his paper for publication?

19 A No.

20 MS. O'DELL: Asked and answered.

21 THE COURT: Overruled.

22 BY MS. DILOMBI:

23 Q Is that a common response from a scientific
24 journal to not allow you to resubmit?

25 A In my experience, it's much more common for

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1 the peer-reviewers to provide constructive comments, as
2 I've suggested, and allow for a more robust version of
3 the manuscript to be resubmitted. It's not
4 extraordinarily rare. It happens that papers are
5 rejected outright, but it's uncommon.

6 Q What's the significance of it being rejected

7 twice outright for publication?

8 A That it simply has a multitude of what we
9 refer to as fatal flaws that are beyond fixable.

10 Q We kind of talked about it. Do you know the
11 specific problems that led to the rejection of his study
12 by Gynecologic Oncology?

13 A Yes. They were very similar to the design
14 flaws that we showed the jury earlier, in terms of
15 experiments themselves. There were extremely egregious
16 flaws in Dr. Saed's interpretation of the data.

17 I mentioned one, the confusing of naturally
18 occurring genetic variation between one human and
19 another with mutations, for example. And he confused
20 cell proliferation with cellular carcinogenic
21 transformation and so forth.

22 And the conclusions of the paper, again,
23 stated in the title are just completely inconsistent
24 with the findings of the paper. There was no increased
25 risk of ovarian cancer demonstrated.

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3764

1 Q So, ultimately, what did the Gynecologic
2 Oncology journal determine as a result to whether

3 Dr. Saed's study supported any claim that talcum powder
4 can cause ovarian cancer?

5 MS. O'DELL: Objection, Your Honor. Misstates
6 the record.

7 THE COURT: Overruled.

8 THE WITNESS: The journal explained to
9 Dr. Saed that his conclusions were not supported by
10 data, and, therefore, that the paper could not be
11 accepted in Gynecologic Oncology for publication.

12 BY MS. DILOMBI:

13 Q Let's turn to the second study, which is
14 actually Dr. Saed's 2023 article. And that one is --
15 I'm just going to direct the jury, and for, counsel,
16 "Talcum Powder Induces Malignant Transformation in
17 Normal Human Primary Ovarian Epithelial Cells."

18 What journal agreed to publish this second
19 study by Dr. Saed?

20 A It's an Italian journal. The title of the
21 journal is "Minerva Obstetrics and Gynecology."

22 Q And it's actually got the Italian title on it,
23 "Edizioni Minerva Medica," right?

24 A Yes.

25 Q All right. Before seeing this article, had

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1 you ever heard of Minerva Obstetrics and Gynecology?

2 A No, I had not.

3 Q Do you know, is it a highly ranked journal?

4 A It's certainly not a journal I read as an
5 expert in gynecologic cancers, and I would state that
6 very few of my colleagues have heard of it or read it
7 either.

8 Q Was Minerva Obstetrics and Gynecology
9 Dr. Saed's first choice for publishing his 2023 study,
10 or even his second or third choice?

11 MS. O'DELL: Objection to speculation.

12 THE COURT: Sustained.

13 BY MS. DILOMBI:

14 Q Well, to what journals did he submit his
15 second cell study of his publication before he submitted
16 it to Minerva?

17 A The second publication was first submitted to
18 a journal called Reproductive Sciences. It was rejected
19 outright. He then submitted the paper to a journal
20 called PLOS One, "PLOS" standing for Public Library of
21 Science, One.

22 Q Second journal?

23 A Rejected outright. And then he submitted the

24 journal again to the Gynecologic Oncology journal that
25 we referenced earlier. The paper was, for a third time,

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1 rejected outright. And then, finally, Minerva
2 Obstetrics and Gynecology chose to accept the paper for
3 publication.

4 Q So three journals rejected him, and then
5 Minerva was the fourth one that accepted it, right?

6 A That's correct.

7 Q Why did these journals -- and let me make sure
8 I have them right. Reproductive Sciences, PLOS One, and
9 Gynecologic Oncology. Why did those three journals
10 reject Dr. Saed's second cell study involving talc?

11 A We could walk through the litany of issues.
12 Study design, data interpretation, conclusions --

13 Q Do you have a slide that kind of summarizes
14 that opinion so that we can get through it quickly?

15 A I do, yes.

16 MS. DILOMBI: Could you put up the next
17 slide, please, John.

18 THE WITNESS: So these are some of the study
19 design flaws. Again, inappropriate cell lines.

20 MS. O'DELL: Excuse me, sir.

21 I don't think I have this slide.

22 BY MS. DILOMBI:

23 Q So these summarize your opinion, in terms of
24 the rejection by the three journals?

25 A No, these are just simply the study design

↑

3767

1 flaws. I also have opinions regarding his
2 interpretation of the data, the experiments he
3 performed, and the conclusions that he drew from the
4 experiments that he performed. So this is sort of the
5 beginning of the end, if you will.

6 Q So let me ask you: You kind of mentioned
7 inappropriate cell lines. Did he again use a very high
8 dose of talc?

9 A Yes, same issues as before with the
10 unrealistically high talc dosage.

11 Q Was the testing method Dr. Saed used in this
12 study capable of showing malignant transformation of
13 cells?

14 A No, he looked at two end points in this
15 particular study, different from his first study. He

16 looked at cell proliferation, again, in a different
17 context, but it's not particularly relevant.

18 The fact that talc caused the cell
19 proliferation is in no way relevant to causing malignant
20 transformation. And he looked at the effect of talc on
21 gene expression for a particular gene, one specific gene
22 known as P53, and he found that changes in the
23 expression of P53 were evident, and he equated this with
24 genetic mutation, which is, of course, not correct.
25 Gene expression is not gene mutation.

↑

3768

1 And those were his two major findings. And
2 the reviewers, in all three of the journals from which
3 this paper was rejected, pointed out some of those
4 flaws, as I've summarized them to the Court just now.

5 Q Did the study even show any malignant
6 transformation?

7 A None at all.

8 Q Almost done. We discussed a little earlier
9 the three journals that rejected the journals. Any
10 other reasons that the journals rejected Dr. Saed's
11 second cell study?

12 A No. If one were to read through the actual
13 peer-review comments from all three journals'
14 peer-reviewers, it's just a similar theme. They are
15 criticizing all aspects of the study, from study design
16 to the study end points, to the data interpretation,
17 using some fairly egregious and pejorative terms with
18 respect to -- not to the authors, of course, but to the
19 science embedded in the studies.

20 Q Right. So they weren't being pejorative of
21 the authors or doctors, but --

22 A Not at all.

23 Q -- just in terms of the data and the study and
24 design flaws. So, for instance, did they call the
25 methodology unclear methodology that's highly worrisome?

↑

3769

1 A Yes.

2 Q Did they say that the findings do not show
3 biologic plausibility?

4 A Yes.

5 Q Did they say there's no justification for the
6 amount of talc used?

7 A Yes.

8 Q Did they say the conclusions are outrageous
9 and not supported by the data?

10 A Yes. And "outrageous" is a term that, you
11 know, frankly, we seldom see in peer-review comments.

12 Q And do they say the problems are too numerous
13 to count, and the methodology and data cannot be
14 trusted?

15 A That's correct.

16 Q Did he make any changes to this study, 2023
17 study, before he had it published in Minerva, based on
18 those reviewer comments?

19 A My memory is that he did attempt to correct
20 some of the flaws, but certainly not all of them, since
21 the paper was, in fact, rejected three times before it
22 was finally accepted in Minerva Obstetrics and
23 Gynecology.

24 Q In terms of the PLOS One, did PLOS One say no
25 data is provided for this specific talc powder, in

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3770

1 discussing this 2023 Dr. Saed study?

2 A Yes.

3 Q Do they also say that the authors provide no

4 justification for their chosen dose range?

5 A Yes.

6 Q And if we go to page 157, I believe in this
7 one, it's the last page, does he disclose a conflict of
8 interest also? And if you could just read that for us.
9 Just the very last page of the 2023 study. And if
10 you -- just direct you down.

11 A "Conflicts of Interest: Dr. Saed has served
12 as a paid consultant and expert witness for the
13 plaintiffs in the talcum powder litigation. The
14 remaining authors have no potential conflicts of
15 interest to report."

16 Q All right. Last opinion, animal studies.
17 Let's turn to that.

18 MS. DILOMBI: If you could -- thank you,
19 John. Appreciate it.

20 BY MS. DILOMBI:

21 Q Have you reviewed animal studies involving
22 talcum powder and ovarian cancer?

23 A Yes, I have.

24 Q All right. And let's discuss two of those
25 studies. I want to discuss Hamilton 1984 and Keskin

1 2009, for time, brevity.

2 MS. DILOMBI: Your Honor, may I approach?

3 THE COURT: You may.

4 BY MS. DILOMBI:

5 Q All right. So let me get these in order.

6 So Hamilton and then Keskin. So let's start
7 with Hamilton 1984, "Effects of talcum and the rat
8 ovary."

9 You got that one in there?

10 A Yes.

11 Q And tell us about this study. How did
12 Hamilton conduct this study, go about studying talc in
13 the rat ovary?

14 A Briefly.

15 Q Yes, briefly, please.

16 A And it's important to recognize that there is
17 a fundamental anatomic difference between rodent ovaries
18 and human ovaries. The rodent ovaries, the mouse and
19 the rat, for example, have a cellular sac, if you will,
20 surrounding the ovary, consisting of a single layer of
21 cells. That's known as a bursa.

22 And Dr. Hamilton, using rats, injected a very
23 large dose of talc into the intra-bursal space. So, in
24 other words, using a needle that pierced the bursa sac,

25 but not the ovary itself.

↑

3772

1 So the ovaries were simply bathed in talcum
2 powder for, more or less, a lifetime. Rodents, mouse
3 and rats, a lifetime for a mouse or rat is two to three
4 years.

5 So, for 18 months, the rat ovaries were bathed
6 in talcum powder, and over a period of time, there were
7 many rats that were injected with -- its ovaries were
8 injected with talc. But over a period of time, at the
9 various time points, three months, six months, nine
10 months, and so forth, the animals were euthanized and
11 the ovaries removed from the animals and examined for
12 neoplastic or cancer-associated effects, up until 18
13 months, where the last group of animals were examined.

14 And at no time were any changes resembling
15 cancer observed over the course of the lifetime of the
16 animal after having had the ovaries bathed in talcum
17 powder.

18 Q So this isn't where the rats are just doused
19 with powder. It's actually using a needle to force the
20 talc into this bursal sac area and just have the ovaries

21 sit in the talc?

22 A That's, more or less, correct, yes.

23 Q What happened? Did they follow the effects?

24 After the two years, 18 months, what did they see?

25 A They saw some changes. Specifically, they saw

↑

3773

1 some -- what are known as papillary projections, which
2 is just the architectural feature of cells, which are
3 difficult to interpret, in terms of the meaning. They
4 are not related to cancer. And then they saw what's
5 known as a foreign body response, which is what occurs
6 when, as you may imagine, a foreign body is introduced
7 into a biological system.

8 I think a good analogy would be a splinter in
9 your hand, and if you are unable to remove the splinter
10 or don't remove it, you see a little red bump appear.
11 That's basically known as a granulomatous response,
12 foreign body response. It consists of white cells and
13 other types of cells that recognize the body is foreign,
14 and create a very noncancerous response, known as a
15 foreign body response, and a small lesion known as a
16 granuloma.

17 Q So did Hamilton find any cancerous changes,
18 despite the changes you discussed? Were they cancerous
19 changes in the ovaries?

20 A No, they weren't cancerous. They weren't
21 pre-cancerous. Nothing has ever been cancer.

22 Q And the last study I want to talk about, the
23 Keskin study. And that one's titled "Does Long-Term
24 Talc Exposure Have a Carcinogenic Effect on the Female
25 Genital System of Rats: An Experimental Pilot Study."

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3774

1 And did Keskin's approach differ from
2 Hamilton's approach?

3 A Yes, slightly. Dr. Keskin used rats again.
4 And in terms of the route of exposure of the rats to
5 talcum powder, in this case, the talc was applied to the
6 perineal area, which I'm sure you've heard about many
7 times now over the course of this litigation.

8 This is basically the external genitalia area.
9 And he also injected talc intravaginally, which is using
10 a syringe into the vagina of the rats. And then
11 followed them over a period of time, similar to the
12 Hamilton study. Removed the ovaries from the rats and

13 examined the ovaries for any evidence of neoplastic or
14 cancerous-associated change, and found none.

15 Q So zero cancerous changes in the ovary of the
16 rats that were injected intravaginally and then followed
17 over time?

18 A Yes.

19 Q All right. Are you aware of any animal
20 studies showing that talc causes ovarian cancer?

21 A No.

22 Q Dr. Boyd, can ovarian cancer and primary
23 peritoneal carcinoma result from sporadic mutations from
24 natural copying errors of cells?

25 A Yes. In fact, they must result from

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3775

1 mutations, because, as we've discussed many times by
2 now, all cancers result from mutations. No mutations,
3 no cancer.

4 Q Based on all of your work in ovarian cancer
5 over the decades, has any cell or animal study shown
6 that talc, asbestos, fibrous talc, caused any cancerous
7 changes or cancerous effects in ovarian cells or
8 gynecologic tissues?

9 A No, not to my knowledge.

10 Q Do you hold these opinions to a reasonable
11 degree of medical and scientific certainty?

12 A I do.

13 MS. DIOLOMBI: Thank you for your time.

14 THE COURT: Cross?

15 CROSS-EXAMINATION

16 BY MS. O'DELL:

17 Q Good morning, Dr. Boyd.

18 A Good morning.

19 Q My name is Leigh O'Dell. I don't think we've
20 met before, and I have a few questions for you.

21 First, you just said that cancer is a genetic
22 disease. Did I hear you correctly?

23 A Yes, you did.

24 Q And you agree with me that genes and DNA can
25 be damaged due to environmental exposures, correct?

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3776

1 A No, that's an extremely broad and general
2 statement that I wouldn't agree with.

3 Q You wouldn't agree with?

4 A No.

5 Q Okay. Let me ask you a different way. Let's
6 see if we can agree to some definitions.

7 There can be acquired mutations, correct, as a
8 result of environmental exposures, true?

9 A No, I wouldn't agree with that statement
10 either.

11 Q All right. So radiation causes cancer; do you
12 agree with that?

13 A No, I don't. So the reason I'm disagreeing is
14 because all of these statements you are making are
15 overly broad and general. If we want to narrow it down
16 to specific organs, specific doses, specific types of
17 carcinogens, we can do that.

18 Q Fair. How about this: Asbestos causes
19 mesothelioma, correct? Yes or no?

20 A Again, even in this context --

21 Q Please, yes or no.

22 A -- that's a very general and broad --

23 Q Asbestos -- exposure to asbestos is a
24 generally accepted cause of mesothelioma, correct?

25 A I'm happy to give you an answer.

1 Q Yes or no, please.

2 A I don't accept the premise of a yes-or-no
3 answer in this context. It's more complicated --

4 Q I have a right to ask you questions, Doctor.

5 A I know you do.

6 Q I'm asking you to respond yes or no, and if
7 you want to clarify, I'm sure your counsel will ask you
8 to clarify. Yes or no?

9 A Under certain conditions, yes, asbestos has
10 been associated with the development of mesothelioma.

11 Q Yes. And from a mechanistic standpoint,
12 asbestos causes genetic mutation, correct?

13 A I'm not aware of evidence regarding specific
14 mutations that asbestos causes in the development of
15 mesothelioma.

16 Q Asbestos causes genotoxicity, correct?

17 A I wouldn't agree with that either. You are
18 asking the same question in a different fashion.

19 Q Let me see if we can agree on what
20 genotoxicity means. Can we do that?

21 A We can attempt to, certainly.

22 Q Genotoxicity is when something causes damage
23 in a cell's genetic information that can cause a
24 mutation, correct?

25 A I would agree with that, yes.

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3778

1 Q And when you have gene mutations, they can be
2 inherited, they can be sporadic, as you talked about,
3 and they can be acquired as a result of an exposure to
4 an environmental component, true?

5 A I've thus far talked about inherited mutations
6 and mutations occurring sporadically as a result of DNA
7 replication. We haven't yet discussed -- I haven't
8 discussed exposure to environmental carcinogens.

9 Q But those can cause mutations that lead to
10 cancer, true?

11 A Again, extremely general and broad question.

12 Q Well, answer generally. Isn't that generally
13 true, sir?

14 A No, I can't answer it generally --

15 THE COURT: You can't speak over each other.

16 MS. O'DELL: I'm sorry.

17 BY MS. O'DELL:

18 Q Let me ask you this question: I just want to
19 get more definitions. Macrophages are related to
20 inflammation, true?

21 A The presence of macrophages are often seen in

22 an inflammatory response.

23 Q Good. We agree on something so far.

24 Second: Reactive oxygen species is part of

25 the inflammatory process, the inflammatory sort of

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3779

1 sequence of events, correct?

2 A It can be. They are related, but not

3 completely synonymous. They are related.

4 Q And in order -- you can see data that

5 establishes steps in the inflammatory process and not

6 reach malignant transformation, true?

7 A Who is "you"?

8 Q In the scientific literature, there are

9 studies that establish that something causes reactive

10 oxygen species, for example, but doesn't report on

11 malignant transformation, correct? There are many cell

12 studies like that.

13 A There may be. I'm not familiar with them.

14 But I'm happy to look at them if you have them.

15 Q What you described as you went through these

16 studies is that the studies did not show malignant

17 transformation. Do you recall your testimony?

18 A I certainly do.

19 Q And I thought you did, so let me ask you this
20 question: That doesn't mean that those studies did not
21 demonstrate evidence of the inflammatory process,
22 correct?

23 A No, that is not correct.

24 Q Okay. We'll go through it.

25 A I saw no evidence of the generation of an

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3780

1 inflammatory response. In fact, it's impossible to
2 demonstrate an inflammatory response in cells, because,
3 by definition, it must happen in an organism.

4 Q And so --

5 A Inflammation, by definition, includes things
6 like neovascularization, increased blood flow, the
7 influx of white blood cells. And so if you're talking
8 about cell studies, cells filtered on a petri dish with
9 medium on the top, there is -- inflammation cannot occur
10 in that context. There is no blood flow. There is no
11 influx of immune cells.

12 Q I understand. I understand.

13 A I just want to make sure you understood how I

14 consider the definition of the term "inflammation."

15 Q Well, let me just say, Doctor, there are
16 numerous studies, cell studies, that measure changes in
17 reactive oxygen species, and those are reported in the
18 literature, true?

19 A Perhaps.

20 Q And if it was irrelevant -- because that's the
21 purpose of a cell study. You do something in cell
22 culture to measure the effect on the cells in order to
23 have information about what may be happening in the
24 human body, true? It is the beginning of the
25 experimental process, fair?

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3781

1 A I think that's fair, yes. We discussed the
2 three stages of establishing biological plausibility,
3 beginning with cells, progressing to animals -- I'm not
4 done -- finishing, if possible, with human observations.

5 Q And you do not have to have malignant
6 transformation demonstrated in a study in order for the
7 study to be relevant, correct?

8 A Well, if you're stating that the study is
9 demonstrating malignant transformation, you definitely

10 have to have malignant transformation for the study to
11 be relevant. So you're kind of twisting -- it's a
12 twisted question.

13 Q Well, let's just be clear.

14 A Yes, please.

15 Q You talked about numerous cell studies just a
16 few minutes ago, correct?

17 A That is correct.

18 Q And some of them, you have great criticism of
19 Dr. Saed, I understand that. But there are other cell
20 studies that you mentioned, and they reported
21 information on changes in cells like reactive oxygen
22 species, correct?

23 A Could you repeat that last question.

24 Q Well, for the sake of time, sir, I'm going to
25 move on. Let's just get down to -- because I've got

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3782

1 just a few minutes here.

2 A I'm sorry, the questions are difficult for me
3 to process. I'm sorry.

4 Q Let me see if I can ask a better question.

5 And I'm going to change topics on you, just for the sake

6 of time.

7 Do you know -- you've criticized our experts,
8 the plaintiff's experts, for supposedly relying on cell
9 studies for purposes of their opinion. That's part of
10 what you're doing here today, correct?

11 A I have criticized, yes, the studies that I've
12 criticized.

13 Q Which plaintiff's expert relied on the cell
14 studies that you mentioned today? Which of the
15 plaintiff's experts in this case relied on, for example,
16 Dr. Saed? Or relied on the Shukla study, or relied on
17 the Buz'Zard study?

18 A I don't have access to plaintiff's transcripts
19 for this litigation.

20 Q In fact, none of plaintiff's causation experts
21 are on your list of materials that you reviewed. You
22 have no idea how much weight they put on these studies
23 or how much weight they did not put on these studies, do
24 you, sir? Correct?

25 You don't know who they are, you haven't

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3783

1 looked at their reports, you haven't looked at their

2 testimony in this case; isn't that true?

3 A That's a fair statement, yes.

4 Q And so let's talk about asbestos. And have
5 you examined the evidence that Johnson's Baby Powder
6 contained asbestos?

7 A No.

8 Q You have not looked at any evidence of that,
9 either from the company documents, true?

10 A What's true?

11 Q Have you looked at company documents
12 demonstrating the presence of asbestos in Johnson's Baby
13 Powder?

14 A No, I have not.

15 Q Have you looked at the testing from the Food
16 and Drug Administration?

17 A No, I have not.

18 Q Have you looked at the scientific literature
19 that reports on the presence of talc fibers and asbestos
20 in talc deposits?

21 A No, I have not.

22 Q Have you looked at the testing demonstrating
23 the presence of fibrous talc and asbestos in Johnson's
24 Baby Powder that Dr. Rigler did?

25 A No, I did not.

↑

3784

1 Q Are you familiar with the IARC Monograph that
2 discusses asbestos and talc containing asbestiform
3 fibers?

4 A Not in the any great detail, no.

5 Q Have you seen it?

6 A I can't recall.

7 Q Let me show it to you, P5256.

8 MS. DILOMBI: It's not on the reliance list.

9 MS. O'DELL: I'll ask him.

10 BY MS. O'DELL:

11 Q Have you seen this, sir?

12 A I don't recall having seen this, no.

13 Q So you've not seen the International Agency
14 For the Research on Carcinogens monograph on asbestos
15 and talc containing asbestiform fibers, correct?

16 A I have not seen this, correct.

17 Q And you have not considered what it has to say
18 about the mechanism by which fibers cause cancer, true?
19 You've not considered that as part of your opinions in
20 this case?

21 A I'm sorry, would you repeat the question.

22 Q I'd be happy to. You have not considered what

23 IARC says about the mechanisms by which asbestos and
24 fibers cause cancer as part of --

25 A If we're --

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3785

1 Q Excuse me, sir.

2 -- as a part of your opinions in this case,
3 correct?

4 A If we are talking about this document again,
5 yes, for the third time, I haven't read it.

6 Q Haven't read it, haven't considered it, don't
7 know what it says?

8 A That is correct.

9 Q Now, you do know a lot about cancer, don't
10 you?

11 A That's a relative term, "a lot," but I would
12 say I've spent 30 years studying cancer, so yes.

13 Q And you know that fibers, such as asbestos
14 fibers, can cause DNA damage. DNA breaks and oxidize
15 bases of the DNA; you know that's true, don't you?

16 A No, I do not.

17 Q And you would agree with me that fibers, such
18 as asbestos or talc fibers, can cause direct damage to

19 the cell?

20 A No, I would not agree with you.

21 Q Don't agree with that.

22 And if IARC concludes that, you think they are
23 wrong, having not considered the data?

24 A I can't consider something that is wrong,
25 having not read it or not considered the data. That's a

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3786

1 jumbled sort of syntax.

2 Q And you've not, as a part of your preparation
3 in this case, which involves allegations of exposure to
4 asbestos and talc fibers, you have not considered any of
5 this evidence, correct?

6 A Again, if we are talking about this, for the
7 fourth time, I've not considered it.

8 Q Okay. Now, you've talked about a number of
9 studies this morning, evaluating the experiments -- let
10 me start over. Excuse me.

11 You've talked about a number of studies this
12 morning, cell studies, evaluating talc in certain
13 experiments, correct?

14 A Yes, that's correct.

15 Q And you stopped, I believe, and you talked
16 about the Shukla paper, which was published in -- I
17 believe it was -- let me just get it to make sure I'm
18 correct.

19 You talked about the Shukla paper, which was
20 published in 2009, correct?

21 A I'll take your word for it.

22 Q I know you don't want to take my word for
23 anything, probably.

24 MS. DILOMBI: Objection, Your Honor.

25 THE COURT: Sustained.

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3787

1 MS. O'DELL: My apologies, Your Honor.

2 BY MS. O'DELL:

3 Q You talked about the Buz'Zard study, and it
4 was published in 2007. Do you see that?

5 A It was accepted in 2007. That doesn't mean it
6 was published in 2007. Perhaps, if you look at the top
7 of the paper, you would be more likely to come across
8 the date of publication.

9 Q Okay. And -- but you haven't considered the
10 recent studies that evaluate talc in cell studies, have

11 you, sir?

12 A I have no idea what recent studies you are
13 referring to.

14 Q Let me show you two studies. First, have you
15 considered the Manrino study that was published in 2019,
16 that evaluates the effect of talc particles on
17 phagocytes in culture with ovarian cancer? You haven't
18 considered this paper, have you, sir?

19 A I don't recall reading this paper, no.

20 Q And there was another paper, following this
21 study, by Imee and others that was published in 2002.
22 And I want to show you that, sir.

23 MS. DILOMBI: We might have the second copy
24 of that have article, so I could take a look at
25 what you're showing him, please.

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3788

1 MS. O'DELL: Absolutely.

2 BY MS. O'DELL:

3 Q Have you seen that study, sir?

4 A I don't recall seeing it, no.

5 Q And the title of that study is -- it's not the
6 clearest title, but it evaluates talc in a cell study,

7 correct?

8 A Well, it appears to evaluate talc with respect
9 to exposure to a type of cell known as macrophage, which
10 is a blood cell.

11 Q Correct?

12 A Certainly not an ovarian cell.

13 Q You have not read that, have you, sir?

14 A No, I'm just reading very quickly here the
15 title and abstract.

16 MS. O'DELL: I have no further questions.

17 Thank you, sir.

18 THE COURT: Redirect?

19 MS. DILOMBI: Briefly.

20 REDIRECT EXAMINATION

21 BY MS. DILOMBI:

22 Q Dr. Boyd, are you aware of any evidence that
23 talc applied to cells causes any effect that can cause
24 cancer?

25 A No, I'm not.

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3789

1 Q And you've reviewed studies that have examined
2 what happens when scientists put cosmetic talc on cells,

3 correct?

4 A That's correct.

5 Q And for those studies that have looked at
6 putting cosmetic talc on cells, what is your conclusion?

7 A Talc does not cause cancer.

8 MS. DILOMBI: I believe that's all the
9 questions I have.

10 THE COURT: Ladies and gentlemen, do you have
11 any questions of this witness?

12 Rod, can you help me, please.

13 Can you-all step into the jury room for a
14 brief moment, please.

15 (The jurors exited the courtroom.)

16 THE COURT: You-all can be seated.

17 For the record, the Court has given the
18 questions to the lawyers, as I have done every
19 single time we've had a question, to discuss the
20 issues as to whether or not there's any objection
21 to the question being asked.

22 I think they are ready to deliberate based on
23 these questions.

24 All right. Give me the questions back,
25 please.

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3790

1 MR. OLIVER: We all object to this first one.

2 THE COURT: You object to which one?

3 MR. OLIVER: Everybody objects to the top one.

4 THE COURT: This one?

5 MR. OLIVER: Yes.

6 THE COURT: All right. We'll ask one at a
7 time, and you tell me what your objections are. We
8 are probably not going to read this one. This is
9 the question you coincidentally reject? Who
10 objects to that? Plaintiff?

11 MS. O'DELL: I'm sorry, sir.

12 THE COURT: I need to know -- can you step
13 outside, please.

14 THE WITNESS: Yes.

15 (The witness leaves the witness stand.)

16 THE COURT: You coincidentally reject all
17 evidence that doesn't rise to your arbitrary and
18 impossible-to-meet standard. Do you need a
19 scientific study to prove the law of gravity is
20 true?

21 MR. OLIVER: We object.

22 MS. DILOMBI: We object.

23 MR. OLIVER: It's argumentative.

24 THE COURT: Okay. Is your testimony that
25 genetic mutations are the only way a woman will

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3791

1 develop ovarian cancer? If so, you are -- if so,
2 you are flat-out wrong and do not have any
3 credibility, in light of all the evidence presented
4 by the other experts, right?

5 MR. OLIVER: Your Honor, we would read the
6 first part of the question and cut the last part.

7 Are you okay with that?

8 MS. DILOMBI: Yeah, that's fine.

9 THE COURT: If your testimony is that asbestos
10 absorbed into a woman's reproductive system through
11 the vagina poses no risk whatsoever to her risk of
12 developing ovarian cancer, is -- I'm sorry, if that
13 is your opinion, why should we believe anything you
14 say? Because the opinion is absurd.

15 MS. DILOMBI: We object.

16 THE COURT: Plaintiff, do you object?

17 MR. OLIVER: Join the objection. We'll join
18 their objection.

19 THE COURT: Do not read this question?

20 MR. OLIVER: Do not read that question.

21 THE COURT: Isn't it true that asbestos is a
22 known human carcinogen? Isn't it true there is no
23 safe level of asbestos for humans?

24 MR. OLIVER: No objection.

25 MS. DILOMBI: No objection.

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3792

1 THE COURT: When preparing a cell sample,
2 would you touch or handle a potentially
3 contaminated object, for example, a portable
4 air-conditioner, before handling the sample?

5 Plaintiff?

6 MR. OLIVER: We join their objection.

7 THE COURT: I'm asking you.

8 MR. OLIVER: We object.

9 THE COURT: Why have you not at least read the
10 very relevant IARC document, which directly
11 contradicts many of your opinions in this case?

12 Any objection to that question?

13 Plaintiff?

14 MR. OLIVER: None.

15 THE COURT: Defense?

16 MS. DILOMBI: We object, Your Honor.

17 THE COURT: What's the objection?

18 MS. DILOMBI: Argumentative, 403,
19 prejudicial.

20 THE COURT: No, I'm reading it.

21 Do you believe that this prevents you from
22 having a complete comprehensive opinion in the
23 case?

24 I don't see anything wrong with that question.
25 I'm going to allow it. Over objection.

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1 Are you familiar with epigenetics? Is
2 epigenetics one of the reasons why cell studies may
3 not be an accurate representation of causation?

4 MS. O'DELL: We object, Your Honor. It's
5 outside the evidence, discussing epigenetics.

6 THE COURT: Defense?

7 MS. DILOMBI: No objection.

8 THE COURT: Who discussed epigenetics? Did he
9 discuss epigenetics?

10 MS. DILOMBI: I mean, he's a geneticist. He
11 can answer the question.

12 MS. O'DELL: He did not mention epigenetics.

13 MS. DILOMBI: I don't believe so.

14 THE COURT: All right. I'm not going to ask
15 the question.

16 Recently, science has shown that
17 epigenetics -- I think that's what it is -- can
18 turn on and off genes, and with -- and this could
19 contribute to SNP in genes, which could eventually
20 lead to disease and/or cancer. Is it your opinion
21 that this is not accurate?

22 MR. OLIVER: Same objection from plaintiff.

23 THE COURT: He didn't give an opinion, though.

24 MS. DILOMBI: It's fine by us, but --

25 THE COURT: All right.

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1 Rod, can you get the witness for me, please.

2 (Witness resumes witness stand.)

3 THE COURT: Thanks, Rod.

4 (The jury enters the courtroom.)

5 THE COURT: All right. You-all can be seated.

6 Be comfortable, please.

7 For the record, all of our jurors are present.

8 All the parties are present. The witness is on the
9 witness stand, still under oath.

10 "Sir, why have you not at least read the very
11 relevant IARC documents, which directly contradicts
12 many of your opinions in this case? Do you believe
13 that this prevents you from having a complete
14 comprehensive opinion in this case? If not, how
15 would you know, if you haven't read it?"

16 THE WITNESS: I prefer to rely on primary
17 peer-reviewed literature as opposed to government
18 agencies' opinions otherwise rendered by various
19 groups. I believe I've looked at the relevant
20 peer-reviewed scientific literature on this topic.

21 THE COURT: "Isn't it true that asbestos is a
22 known human carcinogen?"

23 THE WITNESS: Again, I would suggest that, as
24 I did earlier, that that's a very broad and general
25 question, and it depends very much so on specific

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1 circumstances --

2 THE COURT: Talk to them, sir. They are the
3 ones who asked the question.

4 THE WITNESS: I'm sorry.

5 I would say that that's a very broad and
6 general question. It depends very much so on
7 dosage, on length of exposure, and on organs that
8 may have been exposed, as to whether asbestos is a
9 known human carcinogen.

10 THE COURT: "Isn't it true there is no safe
11 levels of asbestos for humans?"

12 THE WITNESS: I would not agree with that
13 statement, no.

14 THE COURT: "Is it your testimony that genetic
15 mutations are the only way a woman will develop
16 ovarian cancer?"

17 THE WITNESS: That is absolutely correct.
18 Genetic mutations is the only way any individual
19 will develop any cancer.

20 THE COURT: Any questions, Defense, based upon
21 those questions?

22 MS. DILOMBI: No questions, Your Honor.

23 THE COURT: Plaintiff?

24 MS. O'DELL: No, Your Honor.

25 THE COURT: Thank you, sir. You may step

1 down.

2 (Witness excused.)

3 THE COURT: Defense, call your next witness.

4 MS. DIOLOMBI: Defense calls Dr. Juan Felix.

5 THE COURT: Ladies and gentlemen, my
6 understanding is this is the last witness that will
7 be called. That is my understanding. It may be
8 different, but that is my understanding.

9 And the goal is, hopefully, after we finish
10 this witness, we'll take lunch and then come back
11 and do the closing arguments, if you wanted to know
12 the plan.

13 MR. OLIVER: Your Honor, there is a laptop
14 they are setting up for the witness.

15 MS. BROWN: It's a demonstrative.

16 THE COURT: I guess they are going to tap it
17 into the screen. And whatever you want to do, it
18 will project onto the screen.

19 MR. OLIVER: Okay. I got it.

20 THE COURT: Please come forward, sir. Raise
21 your right hand.

22 Thereupon:

23 DR. JUAN FELIX, M.D.

24 Was called as a witness and, having been first

25 duly sworn and responding "I do," was examined and

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1 testified as follows:

2 THE COURT: You can have a seat. Give us your
3 full name, spell your last name for the record,
4 please.

5 THE WITNESS: Thank you.

6 My name is Juan Carlos Felix. F-E-L-I-X is
7 the spelling of my last name.

8 DIRECT EXAMINATION

9 BY MS. DILOMBI:

10 Q Good morning, Dr. Felix.

11 A Good morning.

12 Q How are you?

13 A I'm very well; thank you for asking.

14 Q All right. So you've given the jurors your
15 name. Can you tell us what you do?

16 A I am a medical doctor specializing in anatomic
17 pathology.

18 Q And how long have you been a pathologist?

19 A Depending on how you calculate it, about 35
20 years.

21 Q Are you also a gynecologic pathologist?

22 A Yes, I did subspecialty training in
23 obstetrical and gynecologic pathology.

24 Q And how long have you been a gynecologic
25 pathologist?

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1 A Thirty-four years.

2 Q Do you hold any board certifications?

3 A Yes, I do. I am boarded by the American
4 College of Pathology in anatomic pathology and in
5 cytopathology.

6 Q And we'll talk a little bit more about
7 cytopathology in a little bit. Where are you currently
8 licensed to practice medicine?

9 A I currently practice in the state of
10 Wisconsin, so I'm licensed in Wisconsin. I'm also
11 licensed in New York, New Jersey, California, Arizona,
12 and Texas.

13 Q And so is your current practice actually in
14 Wisconsin?

15 A Yes, it's in Milwaukee.

16 Q All right. And what is -- where is your

17 practice? What is the name of your practice?

18 A So my employer is the Medical College of
19 Wisconsin, and the teaching hospital for the Medical
20 College of Wisconsin is the Froedtert Hospital, which is
21 a large tertiary care hospital.

22 Q All right. We'll talk about that in a little
23 bit also. We'll go through your qualifications in more
24 detail in a few minutes, but I'd like the jury to
25 understand what you'll be testifying about today, okay?

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1 A Okay.

2 Q Were you asked to review Dr. Marilyn Seskin's
3 tissue slides and confirm her diagnosis of primary
4 peritoneal serous carcinoma?

5 A That is correct, yes.

6 Q Were you also asked to review her tissue for
7 evidence of biologic exposure to talc, asbestos, or
8 other foreign material?

9 A I was also asked to do that, yes.

10 Q Let's walk through your education and
11 training. In preparing for trial, did you help put
12 together a number of PowerPoint slides that accurately

13 reflect your testimony?

14 A Yes, I did.

15 Q And let's start by talking about your
16 education, and we'll go through it one by one. Quickly,
17 though. Where did you go to college?

18 A I went to college at Columbia College of
19 Columbia University in New York City.

20 Q And where did you go after that?

21 A I did my medical training at Cornell
22 University Medical College, also in New York City.

23 Q And after Cornell, where did you go?

24 A Once I received my doctorate, I did an
25 internship and residency in pathology at The New York

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1 Hospital, Cornell Medical Center.

2 Q And in between medical school and your
3 residency, did you also represent Puerto Rico in the
4 Olympics?

5 A I did. I was fortunate enough to put in
6 enough time, training to make the standard, and went to
7 the Los Angeles Olympic Games in Rome.

8 Q And then you also went to the Seoul Olympics

9 also, correct, representing Puerto Rico?

10 A That's correct.

11 Q All right. And that was after residency?

12 A That was right after my training in anatomic
13 pathology, correct.

14 Q After medical school, did you do any
15 internship?

16 A Yes, in pathology.

17 Q Is that the anatomical pathology?

18 A Correct.

19 Q Okay. The jury has heard a little bit about
20 anatomic pathology, which is what your residency
21 training is in.

22 Am I correct that anatomic pathologists look
23 at tissues and cells to diagnose and determine disease?

24 A Yes, that's our primary function.

25 Q Now, after completing your residency in

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1 anatomic pathology, did you go on to complete an
2 advanced degree in the form of a fellowship?

3 A I did. I did a fellowship in obstetrical and
4 gynecologic pathology.

5 Q And did you complete that in 1989?

6 A That is correct.

7 Q How is it you became interested in gynecologic
8 pathology as a specialty?

9 A It was my mentor, Elmer Cramer, highly
10 respected gynecologic pathologist, very inspirational
11 person. Every time I rotated through my residency, I
12 felt it was a wonderful practice, so I asked if I could
13 become his fellow, and he agreed.

14 Q Over the last 35 years, how much of your
15 practice has been dedicated to the diagnosis and study
16 of female reproductive cancers?

17 A The vast majority of my time has been studying
18 and diagnosing tissues of the female genital tract.

19 Q Would you say about 95 percent of your time?

20 A About, yeah.

21 Q As a pathologist with expertise in female
22 reproductive pathology, what sort of cases do you
23 evaluate?

24 A Well, I pretty much look at the whole gamut,
25 from a screening test, like the Pap test, which probably

1 a lot of women are familiar with, that screens for
2 cervical cancer, to biopsies of individual organs, such
3 as the cervix, the endometrium, to complete resections
4 of organs for either a benign or malignant conditions,
5 and those would usually include the cervix, the uterus,
6 the fallopian tubes, and the ovaries. So every organ in
7 the female genital tract is under my purview.

8 Q And the jury has heard about Pap smears. You
9 just mentioned it. Pap smears determine whether further
10 testing needs to be done if it comes back positive?

11 A Yeah. So it's a screening test. If it comes
12 out abnormal, you have to follow it up with biopsies.

13 Q And would those biopsies include of the
14 peritoneum?

15 A Not following up on a Pap smear, but biopsies
16 of the peritoneum are very common to evaluate if a tumor
17 has spread.

18 Q Are there different types of cells that make
19 up the organs in the reproductive system, Dr. Felix?

20 A Yes. So the female reproductive tract is
21 probably one of the more complex parts of the body.
22 Every organ has a function.

23 So the vagina, the cervix are covered by a
24 type of epithelium that's pretty tough. It's like the
25 inside of a mouth: moist, but quite resistant. The

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1 inside of the cervix has mucus cells, and that mucus has
2 a very specific function. It's to allow the passage of
3 sperm so that we can reproduce.

4 The endometrium is highly complex organ that
5 gets ready to get pregnant every month, and if a
6 pregnancy course, the endometrium is capable of
7 nourishing that pregnancy in allowing the placenta and
8 the baby to grow; but if it doesn't become pregnant, the
9 whole thing sheds, and that is when a woman has a
10 menstrual period. And it gets ready to do that again
11 the following month.

12 Then the fallopian tube has very specialized
13 cells, called serous, S-E-R-O-U-S, serous cells, that
14 aid in the transport of both sperm and the egg to and
15 from the fallopian tube, into the uterus.

16 Finally, the ovary is possibly the most
17 complex of all of the organs, meaning it has the most
18 cell types. It has the germ cell, which is what will be
19 fertilized to make a baby.

20 The cells that surround the germ cell, those
21 are stromal cells. There's two different types of

22 those. Then there is the --

23 MR. OLIVER: Your Honor, object to the
24 narrative, and relevance.

25 THE COURT: Overruled.

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1 THE WITNESS: So then the epithelial
2 components of the ovary, which, of course, are the
3 ones that can turn malignant. So very complex
4 system.

5 BY MS. DILOMBI:

6 Q How important is cell type to diagnosis of
7 cancer?

8 A It's extremely important. So all of these
9 cells that I've spoken about, all of them can develop
10 cancers. Some cancers, like endometrial cancer of the
11 usual type, are pretty indolent, which means they
12 progress pretty slowly.

13 So in the United States, a woman with
14 endometrial cancer of the usual type has a greater than
15 90 percent chance of survival with just surgery. So a
16 very treatable, very slow growing tumor.

17 However, if that tumor in the endometrium is

18 of a different cell type, called a serous carcinoma of
19 the endometrium, then the prognosis goes from greater
20 than 90 percent survival to less than 40 percent
21 survival. So the cell type alone determines the
22 biologic potential and the prognosis of the patient.

23 Q So if I'm understanding, there are different
24 cells, and then each one of them has its own job and
25 responsibilities that could also impact care and

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1 treatment of the patient?

2 MR. OLIVER: Objection; leading.

3 THE COURT: Overruled.

4 THE WITNESS: Yes, so each cell has a job to
5 do in order to promote preservation of the species,
6 and then when they go -- when they turn cancerous,
7 they all behave very differently.

8 BY MS. DILOMBI:

9 Q Where is your current -- well, you told us.
10 MCW. Froedtert hospital in Milwaukee. You mentioned
11 tertiary.

12 What does that mean?

13 A A tertiary care hospital has specialists in

14 most, if not all, areas of medicine. And it's uncommon
15 to have hospitals like that. There's usually one or two
16 per state.

17 In our hospital, we have surgeons that operate
18 on brain tumors, spinal tumors. We have surgeons who
19 operate on complex cancers. We have all of the
20 transplant surgeons, all of the organs that can be
21 transplanted, so heart, lung, liver, kidneys.

22 And to do that, the surgeon needs a team of
23 specialists to take care of the patient, because it's
24 not just putting the organ in; it's taking care of the
25 patient. We have centers of excellence in pancreatic

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1 cancer and neurobiology, and those are nationally
2 recognized. So that kind of institution.

3 Q So let me ask you: Does Froedtert Hospital
4 employ subspecialists in pathology, such as yourself?

5 A Yes. So I'm the chief of anatomic pathology,
6 and I have recruited over half of my entire faculty, and
7 each person that I hire has fellowship training in their
8 area of expertise.

9 So I have two neuropathologists, meaning brain

10 specialists; two pulmonary pathologists; two breast
11 pathologists; three GI pathologists, gastrointestinal
12 pathologists; and right now, I'm the only true ant.
13 pathologist, but I secured two junior faculty members
14 for next year.

15 Q Is it important, from a clinical standpoint,
16 to employ subspecialists in pathology?

17 A I think it's very important, because
18 particularly in a tertiary care hospital, we get very
19 complex cases. And even though a general pathologist is
20 very capable of making most diagnoses, some diagnoses
21 really require intimate knowledge of a particular organ.

22 I spent 35 years just studying the gynecologic
23 tract. At this point, I think I have a
24 better-than-average chance of getting the diagnosis
25 right. So I think that that's a tremendous benefit to

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1 patients coming to us, to have people who are completely
2 dedicated to that.

3 Q What responsibilities do you have as chief of
4 anatomic pathology?

5 A So I recruit and maintain faculty, retain

6 faculty. So young people, like the ones I'm about to
7 hire, need to be promoted. I need to make sure that
8 they have a scholarly track to be able to be meritorious
9 of a promotion, because promoting them gets a little bit
10 better title.

11 MR. OLIVER: Objection; relevance, Your Honor.

12 THE COURT: Sustained.

13 BY MS. DILOMBI:

14 Q How long have you been at the Medical College
15 of Wisconsin and Froedtert Hospital?

16 A This June, it will be seven years.

17 Q Where did you work before that?

18 A I worked at the Los Angeles County University
19 of Southern California Medical Center.

20 Q What was your title at LA County Hospital in
21 Keck Medical Center USC?

22 A I held titles as chief of surgical pathology
23 at Women's Hospital, LA County Women's Hospital. I held
24 the title of chief of cytopathology at the Los Angeles
25 County Hospital. I was chief of anatomic pathology at

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1 the Keck Hospital, which was the private hospital of

2 USC.

3 Q And just briefly, what is cytopathology?

4 A Cytopathology is the study of individual
5 cells, rather than of tissue. So the most well-known
6 cytopathology test is the Pap smear, where you take
7 cells and you smear them on a glass slide and you look
8 for abnormalities.

9 But today, we have technology to get cells
10 from the lung, cells from the entire gastrointestinal
11 tract, through endoscopy. We also use a fine needle to
12 obtain cells, so we don't need to actually cut a piece
13 of an organ out.

14 If you feel a lump in your neck, you can
15 actually take a needle, take cells out, and make a
16 diagnosis. So that's the field of cytopathology.

17 Q What sort of patients did LA County Hospital
18 cater to? And then tell us how that contributed to your
19 knowledge and expertise in gynecologic pathology.

20 A So LA County was the Southern California's
21 public hospital. It tended to the medically
22 underserved, medically underinsured, and uninsured
23 patients.

24 MR. OLIVER: Objection, Your Honor, relevance.

25 THE COURT: Sustained.

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1 MS. DILOMBI: It goes directly to his
2 knowledge.

3 THE COURT: Sustained.

4 BY MS. DILOMBI:

5 Q Let me move on.

6 Did you review a high volume of gynecologic
7 reproductive cases at Keck Medical Center and LA County
8 Hospital?

9 A Yes. At the time, LA County Women's Hospital
10 was the second largest women's hospital in North
11 America. We reviewed anywhere between 10- and 14,000
12 cases a year.

13 Q And those 10- to 14,000 cases a year that you
14 were seeing in Los Angeles, did those patients come from
15 all over?

16 A Yes. So the vast majority of the patients
17 were the economically challenged people in Los Angeles
18 County, as well as migrant workers in the Central
19 Valley; but we received a significant portion of
20 migrants who would come to LA County specifically for
21 their care.

22 Q Okay. Including internationally?

23 A Including international. We found maps
24 directing patients to LA County Hospital from Argentina.

25 Q Why did you make the move to the Medical

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1 College of Wisconsin from USC, or Los Angeles?

2 A I made the move because I was seeking a little
3 bit more academic liberty when I was at USC. My
4 research is international medicine, and my time to
5 travel was restricted, so I tried to find a job that
6 would allow me to travel.

7 When I got to the Medical College of
8 Wisconsin, the chair said, "As long as you are funded to
9 do your research, we will let you travel."

10 Q And you mentioned funded. Is that
11 grant-funded research that you were doing?

12 A Yes, we have -- I've had several grants from
13 the National Institutes of Health.

14 Q In your 35 years as a practicing gynecologic
15 pathologist, how many gynecologic cases have you
16 reviewed?

17 A It's in the hundreds of thousands.

18 Q And to clarify, when you look at a patient's

19 case, are you looking at just one slide or one type of
20 tissue?

21 A Occasionally, there will be just one biopsy,
22 but most of the time, in a resection, there will be
23 multiple slides, between 15 and 50 slides.

24 Q And of those cases you've reviewed, how many
25 ovaries have you examined?

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1 A Near the neighborhood of 12,000.

2 Q How many ovarian cancers have you diagnosed?

3 A So probably between 4- and 5,000 primary
4 diagnoses of ovarian cancer.

5 Q And would that include with -- your work with
6 Gynecology Oncology Group?

7 A No, those are the primary diagnoses from the
8 hospitals I've worked in. The work from the GOG is a
9 review, and that would probably triple the number of
10 cancers that I've seen.

11 Q In your career, how many primary peritoneal
12 cancers have you diagnosed?

13 A Somewhere between 50 and 60.

14 Q And in terms of primary peritoneal carcinoma,

15 does that represent about 5 percent of all serous-type
16 cancers?

17 A Depending on the series that you read in the
18 literature, between 5 and 10 percent of serous
19 carcinomas.

20 Q And you say you saw maybe 50 to 60 in that
21 range. Is that because primary peritoneal cancer is so
22 rare?

23 A It is quite rare.

24 Q Taking us back to your current practice, how
25 often do you review gynecologic cases?

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1 A I review gynecologic cases every day,
2 particularly, now, when I'm the only gynecologic
3 pathologist at Froedtert Hospital.

4 Q Do all of these cases you review come from
5 patients at Froedtert Hospital or MCW?

6 A No, there is -- hospital bylaws state that if
7 a patient is going to have her care transferred to
8 Froedtert, we must review the pathology from the outside
9 hospital, so that represents probably somewhere around 5
10 to 10 percent of our caseload.

11 Q And so pathologists from other academic and
12 medical institutions around the U.S. and other countries
13 actually send you their cases to review?

14 MR. OLIVER: Objection; leading.

15 THE COURT: Sustained.

16 BY MS. DILOMBI:

17 Q Do pathologists from other academic and
18 medical institutions around the United States and other
19 countries send you their cases to review?

20 A Yes, they do. I've developed a rapport, a
21 relationship with many pathologists from Southern
22 California, Arizona, Texas, Central America, so when
23 they have a difficult case, they share it with me, and
24 I'm glad to give them my opinion.

25 Q Are you an expert regarding the pathogenesis

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1 of the different types of gynecologic cancers?

2 A Yes, I am.

3 Q And what is pathogenesis?

4 A Pathogenesis is the mechanism by which a
5 normal cell is transformed into a cancer cell.

6 Q In addition to your clinical and

7 administrative responsibilities, do you hold academic
8 positions? And I'll walk you through them quickly.

9 Actually, from 1989 to 1992, did you hold a
10 professorship at Cornell University?

11 A Yes, I was assistant professor there.

12 Q And from 1992 to 1995, did you hold a
13 professorship of clinical pathology and obstetrics and
14 gynecology at Keck School of Medicine USC?

15 A Yes, I did. Again, I was an assistant
16 professor at that time.

17 Q And then, again, your position, 1995 to 2021,
18 did you hold a professorship of clinical pathology and
19 obstetrics and gynecology at Keck Medicine USC?

20 A Yes, that's when I was promoted to associate
21 professor.

22 Q And then were you then promoted to professor
23 of clinical pathology and obstetrics and gynecology at
24 Keck School of Medicine from 2002 to 2017?

25 A That's correct.

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1 Q Okay. And then, currently, since 2017, you
2 are a professor of pathology at MCW, right?

3 A Yes, I am.

4 Q Do you have teaching responsibilities?

5 A I do.

6 Q What are those?

7 A I teach residents and fellows on a daily
8 basis. In pathology, we learn by doing, so we sit in a
9 multiheaded scope, and I share my cases with the
10 residents and fellows and, of course, talk about the
11 epidemiology of the disease; I talk about the
12 characteristics of the disease, what makes it possible
13 to diagnose those diseases.

14 In addition, I lecture and lead small group
15 discussions for medical students. So the lectures are
16 usually year 1, year 2 medical students, as are the
17 small group discussions; and then when they become third
18 and fourth years, they actually come and sit sort of
19 around the microscope with my residents.

20 Q Are you involved in any professional societies
21 or organizations?

22 A Quite a few, yes.

23 Q Did we prepare a slide of those so we can get
24 through them quickly?

25 A Sure.

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1 Q All right. I'm just going to run you through
2 these quickly. Since 1982, have you been a member of
3 the National Association for the Advancement of Science?

4 A Yes, I joined that organization when I was
5 really doing a lot of basic science research, and that
6 is an organization that really deals with those basic
7 sciences.

8 Q And since 1984, have you been a member of the
9 New York State Medical Society?

10 A Yes. That was our local.

11 Q Since 1992, have you been a member of the
12 American Society of Clinical Pathology?

13 A Yes. That one is probably the most read
14 journal amongst pathologists.

15 Q In 1992, did you become a member of the
16 American Society of Investigational Pathology?

17 A Yes. And that, again, was to support my basic
18 science work.

19 Q Since 1992 -- and all of these, you are still
20 currently a member of?

21 A Yes.

22 Q Okay. In 1992, did you become a member of
23 Gynecologic Oncology Group?

24 A Yes. And that was an organization that really
25 provided me with a lot of experience in my actual work.

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1 So that's not research; that's more clinical practice.

2 Q All right. Since 1998 to the present, have
3 you been a member of the American Society of Colposcopy
4 and Cervical Pathology Clinic Guidelines?

5 A Yes. So that's the work that I did to
6 establish the guidelines of how to manage patients with
7 an abnormal Pap.

8 Q And since 2017, have you become a member of
9 the Radiological Society of North America?

10 A I have. And we work very closely, hand in
11 hand, with the Department of Radiology, who does all of
12 the radiologic-guided biopsies.

13 Q Okay. And the GOG, Gynecologic Oncology
14 Group, do you conduct clinical trials through that
15 group?

16 A I don't conduct them, but I support them. So
17 it's a group of probably 40, 50 major medical centers,
18 and they would conduct a clinical trial, and between all
19 of them, they can accrue thousands of patients in a

20 couple months, which makes doing a clinical trial really
21 efficient.

22 And each clinical trial, the patients have
23 pathology, and we -- when I say "we," the group of
24 pathologists that participate review all of that
25 pathology.

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1 Q Dr. Felix, have you written or coauthored a
2 number of papers?

3 A Yes, I have.

4 Q About how many?

5 A About 170 right now.

6 Q Okay. And how many of those publications
7 relate to the topic of ovarian cancer?

8 A Probably between 20 and 25 of them.

9 Q Okay. And if I ask you how many are related
10 to gynecologic cancers, what's the percentage, or the
11 number?

12 A Probably close to 90 percent of them.

13 Q What are the topics of the ovarian cancer
14 publications that you recall?

15 A So I worked closely with more basic science

16 researchers who were looking into the mutational profile
17 of ovarian cancer. And my role was to look at the
18 pathology, ensure that the tumors were divided into the
19 right cell types that we spoke about earlier, and then I
20 provided both epidemiologic and follow-up information to
21 the group to see how they related to these mutational
22 profiles.

23 Q As part of your practice, do you also work
24 with an organization called Basic Health International?

25 A Yes, I do.

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1 Q And tell us about that group.

2 A So Basic Health International was founded by
3 Dr. Miriam Cramer with the goal of eradicating cervical
4 cancer in low-income countries. I said I worked in
5 world medicine. I travel to those countries to train --

6 MR. OLIVER: Objection, Your Honor, relevance.

7 THE COURT: Sustained.

8 BY MS. DILOMBI:

9 Q Do you still participate in the organization?

10 A Yes, I do.

11 Q Aside from your clinical work, your teaching,

12 your research, and administrative activity, have you
13 served as an expert on a legal case like this one?

14 A Yes, I have.

15 Q Would the opinions you are offering today be
16 the same opinions you would offer if you had been asked
17 to consult by the plaintiff's attorneys?

18 A Yes.

19 MR. OLIVER: Objection, Your Honor.

20 THE COURT: Sustained, to the form of the
21 question.

22 Disregard the last response.

23 BY MS. DILOMBI:

24 Q And like all of the other experts who have
25 testified so far, have you been paid for your work in

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1 this case?

2 A Yes, I have.

3 Q And how much do you charge per hour?

4 A I charge \$600 an hour for record review.

5 Q Do you charge a flat fee for testifying in
6 court?

7 A Yes, I do.

8 Q Okay. And what's the fee?

9 A It's \$7,000 a day.

10 Q And do you only charge that for today, or how
11 does that work?

12 A For the day in which I testify from this
13 chair.

14 Q You've testified on behalf of plaintiffs and
15 defendants. Your fee doesn't change depending on what
16 side you are testifying on behalf of, right?

17 A It does not.

18 Q Okay. What percentage of your time is spent
19 doing expert witness-related work?

20 A Probably slightly higher than 5 percent, but
21 no more than 10 percent of my time.

22 Q And have you had a variety of lawyers over the
23 years, both plaintiff and defendant, ask you to review
24 the pathology in a case and give them your expert
25 opinion?

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1 A Yes, I have.

2 Q On what sort of cases have you been asked to
3 consult on, and can you give us a breakdown?

4 A Sure. Probably the most common cases that I
5 consult on are birth injury cases, where a baby is born
6 with either some brain damage or another problem that's
7 related to labor, and I'm asked to look at the placenta
8 to see if those injuries can be explained.

9 Then probably the next most common is failure
10 to diagnose cancer, where somebody had a biopsy and they
11 didn't diagnose cancer in time, so my role is to assess
12 whether that biopsy that was controversial had or did
13 not have cancer.

14 Q How do you decide whether to take on a legal
15 case?

16 A Well, the number-one step is that I have
17 expertise in the matter. So if somebody asked me to
18 consult on a brain tumor, I'll immediately say, "No,
19 that's not what I do."

20 Then I'm very careful to make sure that I
21 don't have a conflict of interest. So if somebody named
22 is somebody that I know, then I will not take on than
23 case because I personally think you can't remain
24 objective.

25 And then I have to have the time to be able to

1 dedicate enough time in order to do a fair job of it.

2 Q Have you been asked to review pathology and
3 give your expert opinions in cases involved in claims of
4 smoking-related cancers?

5 MR. OLIVER: Objection; relevance.

6 THE COURT: Overruled.

7 THE WITNESS: Yes, I have.

8 BY MS. DILOMBI:

9 Q How many times have you been asked to review
10 pathology in smoking-related cases?

11 A About 40 times.

12 Q Is that over the last 10 to 15 years?

13 A Over a 15-year period, yes.

14 Q And in how many of those cases were you
15 actually asked to come to court and testify to a jury?

16 A It was either three or four cases, and my
17 memory doesn't work that far.

18 Q And, obviously, you agree that smoking causes
19 cancer?

20 A Yes, I do.

21 Q Okay. Why were you only retained in three to
22 four cases?

23 MR. OLIVER: Objection, Your Honor, relevance.

24 THE COURT: Sustained.

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1 BY MS. DILOMBI:

2 Q Earlier you explained that -- we asked you to
3 do a couple things. So you reviewed Dr. Seskin's tissue
4 slides, right, to confirm her diagnosis?

5 A That's correct.

6 Q And we asked you to review her tissue for
7 evidence of exposure to talc or asbestos or fibrous
8 talc, right?

9 A Yes, you are correct.

10 Q Did you form an opinion about Dr. Seskin's
11 diagnosis?

12 A Yes, I did.

13 Q Do you understand that the plaintiff claims
14 Dr. Seskin's use of talc caused her to develop primary
15 peritoneal cancer?

16 A I understand that that's the claim, yes.

17 Q Did you find any evidence of talc exposure in
18 Dr. Seskin's tissues?

19 A I did not.

20 Q And we'll take a look at some of those slides

21 in a little bit.

22 THE COURT: Folks, we need your attention

23 here.

24 BY MS. DILOMBI:

25 Q Did you find any evidence of asbestos exposure

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3823

1 in her tissues?

2 A I did not.

3 Q And we'll take a look at that, but how are you
4 able to determine that there was no asbestos exposure in
5 her tissues?

6 A So asbestos exposure leaves evidence behind.
7 A foreign body response. In the case of asbestos, it's
8 called -- it's slipping my mind, but it's a
9 ferruginous -- it's an iron coating to the asbestos
10 fiber. A ferruginous body.

11 So in cases of mesothelioma, we look for
12 ferruginous bodies, and usually, in industrial exposure
13 to asbestos, we find those ferruginous bodies. And
14 there was no evidence of ferruginous body in Marilyn
15 Seskin's tissues.

16 Q And you read the deposition of plaintiff's

17 expert, Dr. Sitelman, also a pathologist. You were able
18 to review all of Dr. Seskin's tissue slides, including
19 the additional slides that Dr. Sitelman asked for.

20 And did Dr. Sitelman agree with your opinion
21 that there was no ferruginous bodies and, therefore, no
22 evidence of asbestos exposure?

23 A He did state that he did not find evidence of
24 asbestos exposure.

25 Q As a pathologist, would you expect to see some

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1 evidence of a tissue response if those tissues had, in
2 fact, come into contact with a foreign material like
3 talc or asbestos?

4 A Absolutely. The human body will respond to
5 foreign materials, when deposited into the human body,
6 by forming a foreign body response.

7 Q Would this be true of virtually any foreign
8 material a tissue was actually exposed to?

9 A That is correct. So if you have a surgery and
10 they put a suture in you, that suture is going to elicit
11 a foreign body response, and the body has to do that.
12 It's as common as bleeding if you cut yourself.

13 Q And what type of tissue response would you
14 expect talc or asbestos to cause?

15 A It causes a foreign body response. And
16 there's many types of foreign body response. Depending
17 on the particle size, it could be as simple as a
18 macrophage, which is one of the cells of the body.

19 A macrophage has the ability to engulf
20 particles, and if the particles are small, the
21 macrophage will pick it up and sequester it. If a
22 particle is too big for a macrophage to engulf, the body
23 forms giant cells, foreign body giant cells, and they
24 will try to envelope the particle.

25 If the particle is too big even for that, the

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3825

1 body will form what's called a granuloma, which is a
2 collection of foreign body giant cells that try to
3 surround the particle and sequester the particle.

4 Q Are pathologists trained to identify that type
5 of foreign body reaction in tissue?

6 A Yes, they are, because the reaction is the
7 same or very similar to that seen with infectious
8 organisms. So a person who gets a fungal infection or a

9 person who gets tuberculosis will form granulomas, which
10 are very similar to foreign body granulomas.

11 Q In terms of foreign body response, is that a
12 type of inflammatory reaction?

13 A It is. It's a very specialized form of
14 chronic inflammation.

15 Q Are there other types of inflammation?

16 A There are hundreds of types of inflammation,
17 from very specific antibody directed inflammation to
18 nonspecific bacterial responses, where the cell types
19 are completely different. So there's many, many types
20 of inflammation.

21 Q Did you see inflammation in Dr. Seskin's
22 tissue?

23 A Yes, I did.

24 Q And what was her inflammation from that you
25 could see in the slides?

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1 A The only inflammation that I really detected
2 was associated with Marilyn Seskin's tumor, and these
3 are what's called tumor-associated lymphocytes, or
4 tumor-infiltrated lymphocytes in some of the literature,

5 and they are the bodies -- the immune system's response
6 to the cancer. And in some tumors, those
7 tumor-infiltrating lymphocytes will actually contain the
8 tumor and slow its progression.

9 In other cases, it does not. But the fact
10 that scientists know of this, they are trying now to
11 stimulate the immune system with drugs in order to try
12 to treat tumors.

13 Q And that's not an unexpected finding in a
14 cancer patient when you are looking at cancer slides?

15 A It is not. You will see it in most cancers.

16 Q Did you see any foreign body reactions,
17 though?

18 A I did not.

19 Q Dr. Felix, Dr. Sitelman showed the jury some
20 glass tissue slides prepared from Dr. Seskin's tissue,
21 actual glass slides. As a pathologist, do you review
22 tissue slides to diagnose medical conditions and cancer?

23 A Yes, I do, every day.

24 Q And you looked at the same slides that
25 Dr. Sitelman looked at?

1 A Yes, I did.

2 Q Okay. And did you examine all of Dr. Seskin's
3 tissue slides in this case?

4 A Yes, I did.

5 Q Okay. What different types of tissues were
6 included in Dr. Seskin's slides?

7 A So Dr. Seskin had a total hysterectomy,
8 bilateral salpingo oophorectomy, which means removal of
9 both tubes and ovaries, as well as an omentectomy. The
10 omentum is an organ that -- a fatty organ that hangs
11 from the top of the abdomen, on the inside, all the way
12 down to the mid-pelvis. So they removed that. And
13 that's a common procedure in women who have
14 intraperitoneal serous carcinoma.

15 Q Did you also look at tissue from the
16 gastrocolic ligament?

17 A Yes. The gastrocolic ligament is part of the
18 mesentery of the bowel, and that was involved, so they
19 removed that part as well.

20 Q And you said both tubes. You are talking
21 about Dr. Seskin's fallopian tubes, both of her
22 fallopian tubes?

23 A Yes, fallopian tubes and ovaries, yes.

24 Q From your review of the tissue slides, were
25 you able to confirm Dr. Seskin's diagnosis and reach the

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1 same diagnosis that her pathologist reached?

2 A Yes. Marilyn Seskin had a primary peritoneal
3 high-grade serous carcinoma.

4 Q Okay. And did Dr. Sitelman agree with that
5 opinion?

6 A Yes, he did.

7 Q When you examined Dr. Seskin's tissue to
8 determine diagnosis, what observations did you make to
9 conclude that Dr. Seskin had primary peritoneal
10 carcinoma?

11 A So the current status of diagnosing primary
12 peritoneal carcinoma is that the patient's bulk of the
13 tumor is outside of the ovaries, and, in fact, that the
14 ovary not contain parenchymal, which is the inside of
15 the ovary doesn't have any tumor. In Marilyn Seskin's
16 case, the ovaries did not have any tumor on the inside,
17 only a very little bit of tumor on the surface of the
18 ovary.

19 Q What type of microscope did you use to exam
20 Dr. Seskin's tissue slides?

21 A It was a conventional light microscope.

22 Q I'm calling her Dr. Seskin. You understand
23 that she was an anesthesiologist?

24 A I knew that she was a physician. I didn't
25 know what kind. I'm sorry.

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3829

1 Q Is this the kind of microscope you use daily
2 in your practice as a gynecologic pathologist?

3 A Yes, it is.

4 Q Doctor, do you have images of the actual
5 slides you looked at?

6 A Yes, I do.

7 Q Okay. Will these images be able to show us
8 what you saw when you looked through the microscope?

9 A Yes. The technology to do that has been
10 adopted widely in the United States, and many hospitals
11 actually make their diagnosis using these digital
12 images.

13 Q Okay. And the digital images we're about to
14 show, will they allow the jury to have sort of a
15 bird's-eye view into what you were actually looking at
16 in the tissue slides?

17 A Yes, they will.

18 Q All right.

19 MS. DILOMBI: If we could put that up.

20 BY MS. DILOMBI:

21 Q Let's go through some of the images. We won't
22 go through a lot.

23 MS. DILOMBI: Your Honor, may I approach?

24 THE COURT: You may.

25 THE WITNESS: Thank you.

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3830

1 BY MS. DILOMBI:

2 Q And so let us know what the first thing we are
3 going to look at is.

4 A So this is an example of what we call a
5 section, which is a piece of tissue that was obtained
6 from one of Marilyn Seskin's resection specimens. This
7 particular one was labeled as omentectomy/slash
8 gastrocolic ligament, which is where the bulk of her
9 tumor was. So if you look at this tissue --

10 Q Before you go further, Doctor, I'm sorry,
11 there is a bunch of blue on there. What is that? What
12 are we looking at?

13 A Those blue dots are placed by the pathologist

14 in order to indicate an area of interest. I spend a lot
15 of time trying to figure out who had put the dots there
16 or what they were trying to show, and I didn't come up
17 with a good conclusion.

18 So I'm not sure why so many dots and what they
19 are trying to show, but it's a little bit distracting,
20 and I apologize. I didn't feel that I should alter the
21 slides that I received in any way. These blue dots are
22 pretty easy to remove with xylene, but I just felt that
23 I shouldn't alter the evidence.

24 Q So that's just blue ink we are looking at,
25 like from a --

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3831

1 A From a pen. From a little pen.

2 Q Okay. So go ahead, please.

3 A Sorry. The ability of this program to analyze
4 tissues is really remarkable. It's like when I am
5 looking through a microscope, I look at this at
6 magnification, just to orient myself.

7 MR. OLIVER: Your Honor, objection. We have
8 never seen the use of this at all, this program.

9 THE COURT: Have you previously turned this

10 over to counsel?

11 MS. DILOMBI: They are in the stack.

12 THE COURT: Ladies and gentlemen, can you
13 please step into the jury room for a brief moment.

14 (The jurors exited the courtroom.)

15 MR. OLIVER: Your Honor, I can set this up
16 very easily. At his deposition, Dr. Felix told me
17 he did not make a list of the slides where the
18 particles were in plane, although he did agree that
19 there were some. I didn't have that.

20 I went back to his second deposition. I asked
21 him about that. I don't have that list. Now, all
22 of a sudden, in addition to that, I have a computer
23 program that I've never seen, and I don't know what
24 he's going to do or how he's going to do it.

25 I have no objection to him using the slides

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3832

1 with a regular image, as I thought they were going
2 to do, but now I've got an undisclosed computer
3 program that's going to show something --

4 THE COURT: Why don't you go ahead and play
5 it. What is it going to show?

6 MS. DILOMBI: It's just illustrative.

7 THE COURT: Just play it. Do it.

8 MS. DILOMBI: That's what he's doing.

9 THE COURT: No. I mean now.

10 THE WITNESS: So if I took a regular picture,
11 I would take this picture first. Then I would take
12 a magnification of this picture, which is a picture
13 of this area, which shows a normal tissue that
14 should have been there, the fat of the omentum.

15 Then I would go to the areas that's completely
16 replaced by cancer, and then I would show the type
17 of cancer that this is. And that would be another
18 four or five photographs, but I can do it by just
19 magnifying this image.

20 It shows the architecture of the tumor, it
21 shows the cytology of the tumor, all of which are
22 characteristic of high-grade serous carcinoma.

23 MR. OLIVER: If you're not going to say
24 anything about talcum powder particles using this
25 program, if you're just say going to say this is

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3833

1 the architecture of cancer, I don't think I have an

2 objection to that.

3 MS. DILOMBI: That's what we're doing.

4 THE COURT: The jury is coming in.

5 (The jury enters the courtroom.)

6 THE COURT: You-all can be seated. Be
7 comfortable, please.

8 The witness is on the witness stand, still
9 under oath.

10 You may continue your examination.

11 BY MS. DILOMBI:

12 Q So just to reorient us, this is actually
13 Marilyn Seskin's tumor tissue from her gastrocolic
14 ligament, right? If you could just continue with
15 walking us through, please.

16 A The omentum is composed of fat. Mainly of
17 fat. Obviously, of support structures. But this entire
18 area should look like this.

19 And these are all fat cells. The white areas
20 that are encircled by these little lines, that is the
21 cytoplasm of the fat cell, the nucleus of the fat cell,
22 and it's filled with fat. You can see that, in addition
23 to the fat, there is blood vessels associated with this
24 tissue, and that's normal. And you can see here little
25 red blood cells that are inside of the blood vessel.

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1 However, instead of having her entire tissue
2 composed of this fat, Marilyn Seskin had a large tumor
3 that was invading and destroying the normal tissue of
4 the omentum. And here is the tumor that we're talking
5 about.

6 These very dark blue cells are high-grade
7 serous carcinoma cells. They are very characteristic.
8 Pathologists can identify these using just the light
9 microscope and be very, very sure that this is serous
10 carcinoma.

11 They have a papillary, a branch-like
12 architecture that you can see here. And they have very
13 highly atypical, meaning nuclei that are different from
14 each other, irregular borders. So these are all
15 characteristics that pathologists look at to make the
16 diagnosis.

17 I mentioned earlier that there was a certain
18 type of inflammation involved with her tumor. And here
19 we have an example of that. So whereas these cells are
20 tumor cells that we looked at just a second ago, these
21 little dots that you see here, those are lymphocytes.

22 And I didn't do this on Marilyn Seskin's

23 tissue, but when I do this in my practice, I will type
24 these lymphocytes, and they are almost always T
25 lymphocytes that are cytotoxic T lymphocytes. And it's

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1 fairly well-accepted that that's what these are.

2 So these are the tumor infiltrating
3 lymphocytes. And that's the only inflammation that I
4 found in Dr. Seskin's tissues. I saw no evidence
5 whatsoever of a foreign body reaction, meaning no
6 foreign body giant cells or other forms of inflammation.

7 Q And just a quick shift. You said the word
8 "autoimmunity" in the courtroom. What is autoimmunity,
9 briefly?

10 A Autoimmunity is when the immune system, for a
11 variety of reasons, identifies our own body as foreign
12 starts trying to kill it like it would kill a bacteria.
13 There's many forms of it. Some of them are genetic,
14 some of them are acquired, but, in essence, it's the
15 body trying to kill your own tissue.

16 Q Does that have anything to do with foreign
17 body reactions to particles in tissue?

18 A It has nothing to do with it, no.

19 Q Let's look at a second slide. And I
20 believe -- well, tell us what you're about to put up.

21 A So this is Marilyn Seskin's right ovary, and
22 it's not normal. An ovary is usually a solid organ, and
23 this ovary of Marilyn Seskin's has a cyst inside of it.
24 And what we are seeing is a dilated cyst.

25 And the cyst is actually formed by a very

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1 uncommon type of tissue in the ovary. This is skin.
2 Normally, ovaries don't have skin. So I made the
3 diagnosis here of a mature teratoma.

4 Marilyn Seskin actually was aware that she had
5 a mature teratoma, but chose not to have it removed,
6 which is a perfectly fine decision because these are
7 completely benign tumors. And, obviously, she was a
8 physician. She knew the risk it would involve, and she
9 didn't take it out. This is the fallopian tube.

10 Q Let me back up. You said -- in terms of the
11 ovaries, is there any cancer, in terms of malignant
12 cancer in those ovaries?

13 A Yes, and it's only present on the very surface
14 of the ovary. Here, for example.

15 So that minuscule little bit of cancer on the
16 surface of the ovary, that's very typical for primary
17 peritoneal carcinomas, because the cells are everywhere
18 inside of the abdomen, and they tend to stick to things,
19 and they tend to stick on the surface of things. But
20 there is no malignancy in the inside of the ovary, the
21 parenchymal or the inside of the ovary.

22 And there was no tumor in her fallopian tubes,
23 which is another site that can generate high-grade
24 serous carcinoma. And this is the very beautiful
25 architecture of the fallopian tube. And, obviously,

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3837

1 this is designed to allow the passage of sperm and then
2 return the fertilized ovum to the uterus.

3 Q So the teratoma that you talked about is
4 benign, and you said it consists of skin cells and other
5 types of cells. Why is that? Skin cells and sweat
6 cells. Why?

7 A It is a germ cell tumor. Germ cells are the
8 cells that get fertilized to make a human. Every once
9 in a while, one of the germ cells starts proliferating
10 on its own and it tries to recapitulate the tissues of

11 the human body.

12 So, in this instance, this particular germ
13 cell is making skin. So here we have the squamous
14 epithelium, which is the surface of the skin, and then
15 underneath it, we have sweat glands.

16 So these tumors frequently will have sebaceous
17 material on the inside and sweat, and they don't smell
18 very good.

19 Q Did you see any foreign body responses on this
20 slide?

21 A No. So there's a lot of normal tissue here.
22 And, as you see there, the tumor implanted on the
23 surface of the ovary.

24 So if there were foreign material exposed --
25 or if this ovary had been exposed to foreign material, I

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3838

1 would expect to find a foreign body reaction to it on
2 the surface, and I found none.

3 Q And we are only putting up two slides for the
4 jury, but you've reviewed all the slides, and what
5 you've talked about, not seeing any foreign body
6 response and walking us through, that was the same

7 throughout Marilyn Seskin's slides?

8 A That is correct. Not a single foreign body
9 reaction.

10 Q And so is that representative of your findings
11 in this case related to Marilyn Seskin?

12 A It is. They are very representative slides.

13 Q And let's put up the last slide.

14 A So this is her other ovary and her other
15 fallopian tube. And you can see, again, in this ovary,
16 this one is normal; it doesn't have a teratoma in it.
17 She is menopausal, so there are no active eggs in her
18 cortex.

19 Again, like the other side, there is a little
20 bit of tumor on the surface in this one. It's even
21 harder to tell. But those very dark cells, those are
22 cancer cells that deposited on the surface of the ovary.

23 However, there is no tumor inside the actual
24 ovary, again, ruling out the ovary as a source of
25 high-grade serous carcinoma, which is why I made the

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1 diagnosis of primary peritoneal high-grade serous
2 carcinoma. There was one other little additional

3 finding. The surface of her ovary did, in fact, have a
4 focus of endometriosis.

5 MR. OLIVER: Objection, Your Honor. This is
6 an undisclosed opinion.

7 THE COURT: Did you previously provide this
8 opinion, or are you just providing it today?

9 THE WITNESS: No, I submitted my notes that
10 had this diagnosis in my notes.

11 THE COURT: Overruled.

12 MS. DIOLOMBI: In the deposition, his notes
13 were given to you.

14 THE COURT: Ask your question, ma'am.

15 MS. DIOLOMBI: Okay. Sorry.

16 BY MS. DIOLOMBI:

17 Q Go ahead, Dr. Felix.

18 A So this is a very characteristic appearance of
19 endometriosis. You have the endometrial glands and
20 endometrial stroma.

21 And I believe that Dr. Seskin actually carried
22 the diagnosis of endometriosis, and, in fact, she has
23 residual endometriosis on this ovary.

24 Q And she, in fact, Dr. Seskin, herself, said
25 under oath that she was diagnosed with endometriosis in

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1 1995, right?

2 A If my recollection is -- yes.

3 Q Do you have training and expertise in the
4 processing -- is that the last slide, actually?

5 A It is.

6 MS. DILOMBI: We can take that down.

7 BY MS. DILOMBI:

8 Q All right. Do you have training and expertise
9 in the processing of human tissue specimens for tissue
10 slides?

11 A Yes, I do. I direct an anatomic pathology
12 lab.

13 Q Okay. And I'm going to hand you this
14 because --

15 MS. DILOMBI: May I approach the witness,
16 Your Honor?

17 THE COURT: You may.

18 BY MS. DILOMBI:

19 Q All right. I'm handing you what's Defendants'
20 MS110001, and then MS110293, MS110294, -95, and -96.

21 Is that the pathology report that you reviewed
22 in Marilyn Seskin's case?

23 A Yes, it is.

24 MS. DILOMBI: Your Honor, I move to have this
25 admitted into evidence.

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1 THE COURT: Any objection?

2 MR. OLIVER: It's already in evidence.

3 MS. DILOMBI: As a stack.

4 MR. OLIVER: We have no objection.

5 MS. DILOMBI: Okay. May it be admitted Your
6 Honor.

7 THE COURT: Is it already in evidence?

8 MR. OLIVER: It is already in evidence.

9 THE COURT: Then it's not coming in again.

10 BY MS. DILOMBI:

11 Q All right. So you've reviewed that, and that
12 pathology report is created from review of slides that
13 were created in a lab. So let's talk about that.

14 Can you explain to us what sort of experience
15 you've had with respect to hospital tissue, laboratory
16 specifically?

17 A Well, I'm currently the medical director of
18 the anatomic lab at Froedtert Hospital. Prior to that,
19 I actually founded two anatomic pathology laboratories,

20 the PathNet Esoteric Laboratory, which was a women's
21 health laboratory. Pap smears, cervical biopsies,
22 endometrial biopsies.

23 And I also founded the USC Outreach
24 Laboratory, which was also strictly anatomic pathology
25 laboratory; in this instance, a very much more general

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3842

1 one. We took specimens from all over the body.

2 Q Are hospital pathology labs required to be
3 particle-free and get certifications that they are
4 particle-free?

5 A No. None of the regulatory agencies, the
6 College of American Pathology, or CLEA -- nobody really
7 mandates a particle-free environment.

8 Q Why is that?

9 MR. OLIVER: Objection; speculation.

10 THE COURT: Overruled.

11 Go ahead.

12 THE WITNESS: Because particulate matter that
13 falls onto tissue does not hinder the diagnosis at
14 all. In fact, it's invisible to the pathologist
15 unless they use polarized light.

16 BY MS. DILOMBI:

17 Q And we were actually able to see that, in
18 terms of the slides that you just put up, how detailed
19 and focused they can really get with that
20 hyper-magnification.

21 A Correct. And even though we can magnify the
22 tissue, if there was a particle that came in from the
23 environment onto that slide, we would not be able to see
24 it. It would be transparent.

25 Q We are going to talk in more detail about how

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1 tissue is processed for tissue slides in a bit, but do
2 you have expertise identifying foreign material and
3 other processing artifacts in histology slides?

4 A Very much so, yes.

5 Q And does that expertise allow you to
6 distinguish tissue processing artifacts from foreign
7 material present in the tissue before it was removed
8 from the patient during surgery?

9 A Yes. It doesn't require a lot of expertise,
10 but I have it.

11 Q Do you have any examples of foreign body

12 reactions you can show the jury that would help explain
13 what pathologists look for to distinguish a true
14 exposure from processing artifacts?

15 A Yes, I do.

16 Q Okay. And to be clear, what we are going
17 show, this is for demonstrative purposes, a foreign body
18 response.

19 We are not going to be looking at Marilyn
20 Seskin's tissue, correct?

21 A That's correct.

22 Q All right. And that's because there was no
23 foreign body response in her tissue, correct?

24 A That's correct.

25 Q All right. So let's look at examples of what

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3844

1 foreign body response looks like.

2 MS. DILOMBI: I think, John, you have that
3 one, please. All right. Yeah, it's the slide.

4 All right. Your Honor, may the witness get
5 down?

6 THE COURT: He may.

7 BY MS. DILOMBI:

8 Q All right. Dr. Felix, why don't you come down
9 here and walk us through what we are looking at, in
10 terms of foreign body response.

11 A So I think I mentioned a little earlier the
12 different types of responses vary, and it depends on the
13 size of the particles. So very tiny little particles,
14 such as this one, can be gobbled up by a single
15 macrophage.

16 So this is a macrophage. It's part of our
17 body's immune system. In this instance, these
18 particular macrophages are designed to scavenge for
19 foreign particles.

20 When the foreign particle is too big for a
21 single macrophage to engulf it, a foreign body giant
22 cell forms. And a foreign body giant cell forms by a
23 fusion of many macrophages. In this instance, this
24 foreign body giant cell is engulfing this larger
25 particle.

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3845

1 If the particle is too large for even a giant
2 cell to engulf, then a group of giant cells gets
3 together, like here, to engulf that larger particle.

4 And this is what's called a granuloma. And it's a very
5 specific type of granuloma, which is a foreign body
6 granuloma.

7 So these are the different forms of responses
8 that we can see when there's foreign bodies inside of an
9 organ while the organ is vital, while it's still in the
10 person. If you have the particle but no foreign
11 response, no foreign body response, then you know that
12 particle went there after the organ was devitalized, or
13 outside of the person, and no longer had any blood
14 circulation.

15 Q All right. Is this the sort of reaction you
16 would need to see to confirm that a foreign particle
17 observed in tissue slides represented a true foreign
18 body response?

19 A You would need to see this response in order
20 to say that there was an exposure of foreign material to
21 the body.

22 Q And just to confirm, this is the type of
23 reaction that talc would cause if it were in the
24 tissues?

25 A Absolutely. Talc is one of the foreign

1 materials that causes some of the most vigorous
2 responses.

3 Q And, actually, Dr. Felix, do you have
4 photographs of talc foreign body responses in tissue?

5 A Yes, I do.

6 Q Okay. And, again, what we are going show the
7 jury is not Marilyn Seskin's tissue, correct?

8 A Correct.

9 Q And, again, that's because there was no
10 foreign body response in her tissues, right?

11 A Correct.

12 Q All right. So if we could put up that next
13 slide, and if you could -- you can get down --

14 MS. DILOMBI: Your Honor, may he again?

15 THE COURT: He may.

16 BY MS. DILOMBI:

17 Q And walk the jury through what we are looking
18 at, in terms of talc foreign body response.

19 A So this is a procedure called pleurodesis. It
20 is used when a person's lung collapses. Usually, this
21 occurs in people who have bad emphysema and they form
22 blebs and the bleb ruptures.

23 The chest wall starts filling up with air, and
24 the lung starts becoming compressed. When that happens,

25 obviously, the lung doesn't work as well.

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3847

1 So the effort is made to reinflate the lung.
2 Sometimes reinflating it works, but other times it
3 doesn't. So if it doesn't and the person continues to
4 have collapsing lung, you basically inject the solution
5 of talc or a suspension -- doesn't dissolve -- or a
6 suspension of talc, and then the patient gets rolled
7 around several times to distribute that suspension of
8 talc, and the talc causes irritation, foreign body
9 reaction, and it causes the lung to adhere to the chest
10 wall, not allowing the lung to collapse again.

11 In this image over here, this is taken from a
12 person who had pleurodesis, and you can see all those
13 bright spots is talc particles that are polarized.

14 Q Birefringent particles?

15 A Yes, they are birefringent particles. And in
16 the bottom panel, you can see that every single one of
17 these talc crystals, whether large or tiny, is
18 completely surrounded by a foreign body response.

19 So you have foreign body giant cells you can
20 see there and there, and you have individual macrophages

21 that you can see there and there. It is impossible for
22 talc to be inside the body without foreign reaction.
23 Talc must be surrounded by a foreign body reaction.

24 Q And does that mean that that's cancer?

25 A No, no. No, this is just an inflammatory

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3848

1 response. It's a foreign body response.

2 In fact, we have patients who have had
3 pleurodesis for 40 years, and the literature, the
4 medical literature on pleurodesis, finds no increase of
5 cancer in these patients.

6 Q Does that all just disappear after a while?

7 A No. I've done autopsies on patients who have
8 had pleurodesis 20, 25 years prior, and we can still see
9 the crystals and we can still see the foreign body
10 response 20 years later.

11 Q And even then, you are not seeing cancerous
12 changes when you're doing those autopsies and seeing
13 those in the deceased patient?

14 A Correct.

15 Q Talc foreign body responses don't lead to
16 cancer, do they, Doctor?

17 MR. OLIVER: Objection.

18 THE COURT: Sustained.

19 BY MS. DILOMBI:

20 Q Dr. Felix, is it safe to use so much talc in
21 people's lungs?

22 MR. OLIVER: Objection, Your Honor. It's
23 outside his expertise and cumulative.

24 THE COURT: Overruled.

25 Go ahead.

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3849

1 BY MS. DILOMBI:

2 Q All right. Shifting gears, I want to talk
3 about how tissue in the body becomes tissue slides. And
4 have you prepared some slides to help explain how
5 surgical tissue specimens go from a patient's body to a
6 tissue slide?

7 A I have.

8 Q All right. And, again, what we are going to
9 be looking at, this is not from Marilyn Seskin's case or
10 tissue, correct?

11 A Correct.

12 Q Okay. This is just examples to show the jury

13 how the tissue is prepared?

14 A Correct.

15 Q All right. So if we could go to the first
16 diagram. And if you could step down. And just walk the
17 jury through how tissue from inside the body comes to be
18 on a slide like the Marilyn Seskin slides we saw.

19 A So whenever you have a piece of tissue taken
20 out of your body, many of you might be very familiar
21 with the fact that 90 percent of us is water, so our
22 cells are filled with water, tissues are filled with
23 water, which makes it -- a piece of tissue very squishy,
24 hard to cut very thinly.

25 To look at a slide under the microscope, the

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3850

1 thickness of the slice is about 1/100th of the thickness
2 of one strand of hair. So it's quite thin. Trying to
3 obtain that from a tissue, a piece of tissue that's
4 unprocessed, would be impossible.

5 So to do that, we actually remove the water
6 from the tissue by using alcohol. Alcohol and water are
7 miscible, which means they can mix. And as you increase
8 the concentration of alcohol, the alcohol replaces all

9 the water inside the tissue.

10 Alcohol does not mix with paraffin wax, so we
11 have to get the alcohol out. To do that, we use xylene,
12 which is an organic solvent, and we basically take all
13 the alcohol out and replace it with xylene. Xylene
14 dissolves paraffin. Xylene dissolves wax.

15 So then we put in a concentration of -- a very
16 high concentration of wax dissolved in xylene and
17 infuse, reinflate that tissue with paraffin. At this
18 point, when it's an organic solvent, the tissues are
19 completely permeable.

20 When I say "completely permeable," the cell
21 membranes allow passage of paraffin inside of them. And
22 if there is any substance inside of those fluids or
23 paraffin, the substances will be able to get into the
24 tissue.

25 Finally, once it's infused with paraffin, the

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3851

1 piece of tissue goes into a block of paraffin. It's
2 mounted on an automated slicer, like a bologna slicer,
3 but smaller, and thin sections are taken off and placed
4 on the glass slide.

5 Finally, the paraffin is removed, and we stain
6 the slides with dyes so that we can actually see the
7 structures, which is what we saw earlier, the
8 demonstration earlier. So all of this occurs in the
9 laboratory. Human context occur at multiple points
10 here, as well as context with the environment.

11 Q Okay. And to understand, you have some
12 photographs from a real hospital path lab that captures
13 these steps, correct?

14 A I do.

15 Q All right. We have six pictures. Again, this
16 is not Marilyn Seskin's tissue; just exemplars. Can you
17 tell us what we are looking at in the first slide?

18 A Sure. This is a piece of tissue that was
19 received in a biopsy bottle, and the pathology assistant
20 is currently slicing it in order to optimize the way
21 it's going to be looked at on the glass slide. And
22 these folks are highly trained specialists who really
23 optimally process these specimens.

24 Q And the second slide we are going to look at?

25 A I'm sorry.

1 Q Oh, sorry.

2 A Notice this is getting cut by the piece of --

3 MR. OLIVER: Objection, Your Honor. This is
4 403 and speculation.

5 THE COURT: Overruled.

6 BY MS. DILOMBI:

7 Q You can continue with your answer.

8 A This is cellulose, basically paper talc, and
9 that's what we use, because once we cut this specimen,
10 we pick up the paper and throw it away so that there is
11 no chance that one patient's specimen goes to the other
12 patient.

13 Next slide.

14 Q What is the blue on there?

15 MR. OLIVER: Your Honor, I renew my objection.

16 THE COURT: This is not Marilyn Seskin,
17 correct?

18 MS. DILOMBI: No, it's to show what happens
19 in the lab.

20 THE COURT: Is this what he is doing?

21 MS. DILOMBI: Yeah, this is what he actually
22 does.

23 THE COURT: No, but is he doing this right
24 there?

25 MS. DILOMBI: No, this is what happens in his

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3853

1 laboratory.

2 THE COURT: Sustained.

3 MS. DILOMBI: Thank you. You can take your
4 seat, Dr. Felix.

5 BY MS. DILOMBI:

6 Q So in terms of what happens to tissue in your
7 lab, when it's cut like that, it then goes into the
8 paraffin, as you showed in the diagram, and is put on
9 the slide?

10 A Correct.

11 Q All right. And in terms of what happens to
12 that tissue, does it sometimes sit in vats of water so
13 that they can actually pick up the tissue and put it on
14 the slide?

15 A That is routine histology. After the tissue
16 is cut by the microtome, the cutting device, it gets
17 laid on a water bath in order to remove the wrinkles
18 from the tissue, and gets picked up by a glass slide.

19 Q Is it fair to say that with respect to the
20 tissue you reviewed in this case, lots of people touched
21 the tissue and lots of things were done to the tissue

22 before they ended up on slides?

23 MR. OLIVER: Objection.

24 THE COURT: Sustained.

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3854

1 BY MS. DILOMBI:

2 Q In terms of any particulate that would get on
3 tissue slides from this processing, does that impact
4 your ability to review disease or see disease in the
5 slide?

6 A It does not affect it whatsoever.

7 Q Okay. So it matters -- when you have to
8 determine whether material on a histology slide is a
9 processing artifact or proof of biologic exposure; does
10 that matter?

11 A It's very important to distinguish the two.
12 One of them doesn't have any reaction; the other one has
13 a foreign body reaction.

14 Q Can you walk us through the steps you,
15 Dr. Felix, took to determine there was no evidence of
16 talc exposure in Dr. Seskin's tissues?

17 A Yes. I evaluated every single slide in

18 Dr. Seskin's samples, and I looked exactly for that. I
19 looked for a foreign body reaction. I looked for
20 granulomas. There were none.

21 I was asked by attorneys on the defense side
22 to be extra careful and to look at every polarizable
23 particle and look at high magnification to make sure
24 that there was no macrophage engulfing it, no foreign
25 body reaction. So I took on the arduous task looking of

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3855

1 at every slide under polarized light and looking at it
2 magnified, and I found not one example of a polarizable
3 particle, in the tissues, that had a foreign body
4 reaction.

5 Q Do you always use a polarized light microscope
6 when reviewing tissue slides?

7 A Almost never.

8 Q Why not?

9 A Because the only time I really use it is if I
10 find the granuloma, that structure that we looked at
11 with giant cells, and then I'll polarize it, because if
12 there is a particle inside of that granuloma, then I
13 know that's a foreign body granuloma, and I don't have

14 to worry that it might an infectious granuloma. If
15 there is no polarizable particle, then I have to work
16 that case up. I have to get special studies to see if
17 there is fungus or tuberculosis in that granuloma.

18 Q Okay. But since you don't do that in your
19 practice, again, you did it here, just in terms of
20 giving your opinions to the jury?

21 A Correct.

22 Q Okay. Did you see any birefringent particles
23 in Dr. Seskin's slides?

24 A Many.

25 Q What did you conclude about that birefringent

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3856

1 material?

2 A I concluded that those were processing
3 artifacts.

4 Q So presence alone of birefringent material is
5 irrelevant because you'd need the foreign body response,
6 right?

7 A Correct, correct.

8 Q Do you know what that material was that
9 appeared as birefringent particles on Dr. Seskin's

10 slides?

11 A It could be hundreds of different minerals,
12 anything from silica, sand, to dust. Anyway.

13 Q And we've heard from Dr. Sitelman there's ways
14 to determine what those particles are composed of,
15 right?

16 A There are ways to assess the composition of
17 those particles, yes.

18 Q And just to remind the jury, what are the ways
19 that you can assess what they actually are?

20 A So scanning electron microscopy or
21 transmission electron microscopy, which is huge
22 magnification, together with x-ray diffraction, can
23 determine what minerals and in what -- I'm sorry, what
24 elements and in what proportions those elements are
25 found in a particular particle. And by -- and this is

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3857

1 not my area of expertise, but people who do that will be
2 able to tell whether something is made out of sand or
3 talc or some other substance.

4 Q Did you do that here in this case, use a
5 scanning electron microscope or other to look at the

6 tissue to determine what the particles were?

7 A I did not.

8 Q Why? Was there any reason to?

9 A No, there was no foreign body reaction to --
10 if you discover what that particle is, it just gives you
11 a clue as to the composition of a contaminant.

12 Q Dr. Felix, the jury has heard -- well, we
13 talked about him -- from Dr. Sitelman.

14 Do you agree with Dr. Sitelman -- well, you do
15 agree with him on the diagnosis of primary peritoneal
16 carcinoma?

17 A Yes, I do.

18 Q All right. Do you and Dr. Sitelman also agree
19 that there were no foreign body responses to any of the
20 birefringent particles that you observed in Dr. Seskin's
21 tissue slides?

22 MR. OLIVER: Objection; misstates the facts in
23 the record.

24 THE COURT: Overruled.

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3858

1 BY MS. DILOMBI:

2 Q Based on your review of Dr. Sitelman's
3 deposition, do you and Dr. Sitelman agree that there
4 were no foreign body responses to any of the
5 birefringent particles that you observed in any of
6 Dr. Seskin's tissue slides?

7 A Yes, that is correct.

8 Q Do you both agree, you and Dr. Sitelman, that
9 there is no evidence of asbestos exposure in
10 Dr. Seskin's tissue slides?

11 MR. OLIVER: Objection.

12 THE COURT: Sustained.

13 Let's talk what about he did.

14 BY MS. DILOMBI:

15 Q So Dr. Sitelman prepared photos in this case,
16 which you did review, right?

17 A Yes.

18 Q Okay. Dr. Sitelman showed some of those
19 photos to the jury. And I want to just, because of
20 time -- and we are almost done, I promise -- I want to
21 walk through a couple of those, just two.

22 MS. DILOMBI: Can we pull up Exhibit P4077,
23 please.

24 BY MS. DILOMBI:

25 Q So this is the slide, the picture, one of the

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3859

1 pictures that Dr. Sitelman used, and it's got an
2 artifact that looks like a crab claw or hockey stick,
3 whatever you want to call it. So Dr. Sitelman explained
4 that his slide photographs were blurry because the
5 purpose of a polarized lens is to make the tissue in the
6 background fade.

7 Is that the purpose of polarized light
8 microscopy?

9 MR. OLIVER: Objection, Your Honor.

10 THE COURT: Sustained.

11 BY MS. DILOMBI:

12 Q Why is the image blurry? You reviewed it.
13 You based your opinion on it. Why is the image blurry?

14 A The background cells are blurry because they
15 are in a different plane than the polarizing particle.
16 If you take a portrait of somebody outside and you focus
17 on their face, you would be able to see the face, maybe
18 you can read the writing on the T-shirt perfectly, but
19 when you look at a tree behind it, in the photograph,
20 the leaves will be very blurry.

21 That's because a photographic lens can only
22 capture one plane of focus. The tissue behind it, it's

23 blurry because it's out of focus because it's in a
24 different plane.

25 So this particle is either above or below the

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3860

1 tissue, not inside the tissue.

2 Q All right. Can you take polarized images that
3 are detailed enough to see the cellular detail?

4 A Yes, I showed some earlier on.

5 Q Okay. We saw those.

6 And so these images are polarized. Let's look
7 at another slide of Dr. Sitelman's. This is P4080.
8 Tell us what we are looking at here.

9 A Well, we are looking at a piece of tissue, and
10 then we have a polarized -- a refringent particle that's
11 actually outside of the tissue. And, of course, that
12 would mean that that particle was just an artifact of
13 processing. It fell onto the glass slide sometime after
14 that tissue was removed. Clearly, it's not inside of
15 the tissue. It's clearly a contaminant.

16 Q And did you prepare a slide comparing how
17 detailed you can get with foreign body response?

18 A Yes, I did.

19 Q All right.

20 MS. DIOLOMBI: Can we put up that last
21 plaintiff tissue slide up, please.

22 THE WITNESS: So in the instance of
23 Dr. Sitelman's photograph, you can see that -- you
24 can almost not discern what is in the background
25 when you look at that crystal. If you look at the

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3861

1 image to the left, which is also a polarized
2 photograph, you can see the detail of the cells
3 surrounding it perfectly.

4 Because the particle, that polarized particle,
5 the birefringent particle, is in the same plane as
6 the cells. In the instance on the left, that
7 particle was inside the tissue. On the instance to
8 the right, it was not inside of the tissue.

9 MS. DIOLOMBI: If I could get back the ELMO,
10 please.

11 BY MS. DIOLOMBI:

12 Q And I just have one last question for you.

13 And just to reorient us, this was one of
14 Dr. Sitelman's slides. Is that something that's clearly

15 not in her tissue but is on her tissue slide after all
16 the processing?

17 A Yes, correct.

18 MS. DILOMBI: I have no further questions for
19 you. Thank you.

20 THE COURT: Cross?

21 CROSS-EXAMINATION

22 BY MR. OLIVER:

23 Q Good afternoon, Dr. Felix.

24 A Good afternoon.

25 Q How are you?

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3862

1 A I'm well, thank you.

2 Q Good. We've met before, right?

3 A Yes, we have.

4 Q Okay. We are crunched for time. I'm going to
5 go quickly, if that's okay with you.

6 A I will try to go as quickly as you.

7 Q All right. I'm going to ask you a series of
8 questions. You don't have any problem with yes-or-no
9 questions, do you?

10 A As long as they represent what I think, I

11 don't.

12 Q Okay. Well, the first thing in this case is
13 you don't have any dispute that Marilyn Seskin was a
14 longtime user of Johnson's Baby Powder and applied it to
15 her genitalia.

16 You don't dispute that, right?

17 A I do not.

18 Q Okay. In fact, the attorneys for Johnson &
19 Johnson told you to assume that, correct?

20 A Yes.

21 Q And one of the things that you didn't tell the
22 ladies and gentlemen of the jury when you took the stand
23 or anywhere in your opinion is you came into this
24 courtroom and you didn't believe, you have never
25 believed, that talc can migrate from the female

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3863

1 genitalia into the ovaries, right? You don't believe
2 that?

3 A Correct.

4 Q So when you looked at all of this, you already
5 believed that whatever you found did not come from her
6 genital application of talc, true?

7 A Not necessarily. So I'm willing to be proven
8 wrong. I've never experienced -- I've never seen a case
9 where I saw talc on the ovary after 1980-something,
10 where surgeons still used gloves that had talc on them.
11 After that period of time, I've never seen talc on an
12 ovary, causing a foreign body reaction.

13 Q So you understand, Dr. Felix, that there are
14 physicians and scientists that have studied the
15 migration theory of talc, correct?

16 A Yes, they've attempted to study it.

17 Q And that's not something you have personally
18 studied, true?

19 A True.

20 Q And my point was not that you have or don't
21 have an open mind. My point was simply that when you
22 took this case, you already believed that talc could not
23 travel from the genitalia to the ovaries, right?

24 A Correct, to my personal experience with it.

25 Q You do agree that asbestos is a carcinogen?

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3864

1 A Yes, I do.

2 Q You agree that asbestos fibers have a

3 needle-like shape, correct?

4 A Correct.

5 Q And you agree that many scientists and
6 physicians believe that that needle-like shape of
7 asbestos fibers is one of the reasons that they are a
8 carcinogen, correct?

9 A Yes, you are correct.

10 Q Okay. Now, you spoke a little bit about the
11 inflammatory process that begins cancer.

12 Do you remember that testimony?

13 A Not today.

14 Q Well, you spoke a lot about inflammatory
15 processes, correct?

16 A Regarding Dr. Seskin's case?

17 Q Yes. You tacked about inflammation today,
18 correct?

19 A Yes.

20 Q And you understand that one of the theories
21 about how cancer forms is related to inflammation, true?

22 A To a very specific type of inflammation, true.

23 Q Okay. But if inflammation begins to cause a
24 tumor, that tumor takes some time to develop, right?

25 A Yes.

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3865

1 Q Okay. And so whatever inflammation exists by
2 the time you take out a stage 3 tumor, you are not --
3 nobody can decipher the inflammation from the tumor and
4 go back and say this is the original inflammation that
5 started the process, right? Nobody can do that?

6 A That is incorrect. So in cases of ulcerative
7 colitis, you can absolutely see the inflammation, you
8 can see the destruction of the tissue, and that is why
9 the associated inflammation causes cancer.

10 Q Sir, we are not talking about ulcerative
11 colitis here, right?

12 A No, but you are talking about inflammation
13 causing cancer. You need to see the inflammation in
14 order to say that it caused cancer.

15 Q Let me just move on.

16 One of the other things that we agree on is
17 that Marilyn Seskin had high grade serous cell cancer,
18 correct?

19 A Correct.

20 Q And you said that the type of cell for the
21 cancer was extremely important, true? That's what you
22 said a moment ago?

23 A Yes, yes.

24 Q Okay. And you know that high-grade serous
25 cell carcinoma is the type of literature most often

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3866

1 associated with talcum powder use, right?

2 A When the association is observed, yes, that's
3 the most common cell type.

4 Q You and Dr. Sitelman both used the same
5 process, microscopic process, correct?

6 A I'm making the assumption it's very likely
7 that we both do the same thing.

8 Q Well, you both used polarized light, right?

9 A Yes.

10 Q Okay. Now, did you look at the slides not
11 using polarized light?

12 A Yes.

13 Q Okay. I thought you did, but I wasn't sure.

14 Do you agree with Dr. Sitelman that you can
15 see talc particles using polarized light microscopy,
16 right?

17 A You can see talc particles, yes.

18 Q Okay. And in this case, you talked a moment,
19 at the very end of your testimony, about where the

20 particle would be in the plane of tissue, correct?

21 A Correct.

22 Q And you actually identified some particles in
23 Marilyn Seskin's tissue that were in the plane of
24 tissue, true?

25 A That is absolutely true.

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3867

1 Q Okay. But you didn't make me a list of those,
2 did you? You didn't give me a list of the slides that
3 had a talcum powder particle in the plane of tissue, did
4 you?

5 A Most of the slides have a particle in the
6 plane of tissue section.

7 Q Okay. So most of the slides you saw had a
8 talcum powder particle from the same plane of tissue; is
9 that what you're saying?

10 A You're misinterpreting.

11 Q I'm sorry, had a particle in the plane of
12 tissue.

13 A I didn't say talcum.

14 Q Okay. So you don't know what those particles
15 are, do you?

16 A No.

17 Q You agree they could be talcum powder
18 particles, right?

19 A Yes, they could be.

20 Q You just don't think they were there when she
21 was alive. That's your whole position, correct?

22 A That is based on the inevitability of
23 formation and foreign reaction to a particle, yes.

24 Q Let's talk about -- you relied on your
25 experience in this case, correct?

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3868

1 A Yes.

2 Q And I think my colleague, Ms. Diolombi, asked
3 about your experience using polarized light microscopy.
4 Do you remember that?

5 A Yes.

6 Q And you said, most of the time, you don't use
7 that, right?

8 A Correct, only when necessary.

9 Q Okay. So really quickly, before we do that.
10 In every case you've testified in for Johnson
11 & Johnson, can you tell me the ladies and gentlemen of

12 the jury how many cases that is?

13 A I would have to think about it. Testified in
14 court?

15 Q No, just testified at a deposition or in
16 court.

17 A Probably in the neighborhood of 15 to 20.

18 Q Okay. So, in 15 to 20 cases, you have
19 testified on behalf of Johnson & Johnson, and you have
20 never once testified that the particles you saw were not
21 contamination?

22 A That's correct. That's because none of them
23 were forming foreign body reactions.

24 Q So you don't actually have specific experience
25 looking for cosmetic talcum particles in the tissue of

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3869

1 women with cancer, do you, outside of this litigation?

2 A Sure. I mean, every time I've seen an ovarian
3 cancer, I assess the tissue for foreign body reaction.
4 I just don't find one.

5 MR. OLIVER: Can I get Dr. Felix's deposition
6 from 2021.

7 MS. DIOLOMBI: Can he finish his answer?

8 BY MR. OLIVER:

9 Q I'm not trying to stop you from answering.

10 THE COURT: I think he did. He stopped.

11 BY MR. OLIVER:

12 Q Did you finish?

13 A Yes, I was finished.

14 Q I didn't mean to interrupt you, Doctor.

15 MR. OLIVER: Thank you, Katie.

16 BY MR. OLIVER:

17 Q Here you go, Dr. Felix.

18 So I was asking about your experience, and I
19 would ask you to turn to page 181 through 182, and I'll
20 direct you -- when you've had a chance to get there,
21 I'll direct you to the right line.

22 A I'm there.

23 MS. DILOMBI: 181?

24 MR. OLIVER: Yes.

25

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3870

1 BY MR. OLIVER:

2 Q 181 -- my question was: Do you have specific
3 experience looking for talcum powder particles in

4 women's tissue, right, outside of litigation?

5 A Correct.

6 Q Okay. And you said you did?

7 A No, I said I looked for a foreign body
8 response.

9 Q Okay, that wasn't my question.

10 My question was: Do you, Dr. Juan Felix, have
11 experience looking for talcum powder particles in
12 women's tissue who have cancer? Do you have that
13 experience not in this litigation?

14 A If it's inside a foreign body granuloma, yes.

15 Q So let's just look at what you said in your
16 deposition.

17 I said, "I'm not asking you whether you've
18 looked for a foreign body reaction --"

19 MS. DILOMBI: What line are we at,

20 Mr. Oliver?

21 MR. OLIVER: Oh, I'm sorry, it's line 18.

22 BY MR. OLIVER:

23 Q Line 18: "I'm not asking you whether you've
24 looked for a foreign body reaction. I'm asking you
25 whether you've ever looked for talc contamination in

1 tissue, in your experience that's not related to
2 litigation.

3 You said: "You mean polarizing the normal
4 ovary without a foreign body reaction for talc?"

5 I said: "That's right."

6 And you said: "No, I have not done that,
7 because it's not a very smart thing to do, because
8 ovarian tissue is contaminated in the laboratory so
9 frequently that you are going to find particles in the
10 tissue and they are contaminants, as you use the word
11 'contaminants.'"

12 That's what you said there, right?

13 A Yes.

14 Q So then you told me you didn't have that
15 experience, right?

16 A You are correct, I don't randomly look for
17 contaminate particles.

18 Q So let me -- let me take a piece of paper
19 here.

20 I think you testified about the number of
21 tissue slides you had reviewed with defense counsel. I
22 think you might have given me a different number. What
23 I remember is you said you must have reviewed 20,000
24 ovarian tissue slides in your career.

25 Is that an accurate number?

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3872

1 A Yes.

2 Q Okay. But other than the expert work you do
3 here, you rarely look at tissue under polarized light
4 microscopy, right?

5 A Correct.

6 Q Okay. So of the 20,000 ovaries you've
7 reviewed, 99 percent of those, you didn't look at them
8 under a polarized light microscope, right?

9 A Certainly fewer than 95 percent.

10 Q Okay. All right. So I have written
11 "Dr. Felix's experience."

12 So what are you telling me today? What number
13 did you give me?

14 A It's a very small percentage of cases that I
15 need to polarize.

16 Q Okay. So let's look at your deposition. Turn
17 to page 179, if you would. And tell me when you're
18 ready. I don't want to rush you.

19 A I'm ready.

20 Q We're almost done.

21 Okay. If you turn to page 179, line 7, I
22 asked this question: "Let me do this: In 99 percent of
23 the cases you have reviewed ovarian tissue, you told me
24 you didn't use PLM, correct?"

25 And what did you say?

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3873

1 A I said: "Correct."

2 Q Okay. So I'm going to draw this line over
3 here. This is 99 percent of your experience outside of
4 litigation, right? And that doesn't involve PLM, true?

5 A True.

6 Q Okay. And PLM is how we see birefringent talc
7 particles in tissue slides, right?

8 A If talc exists in tissue, that's how you would
9 see it.

10 Q So in those 99 percent of cases, when you were
11 looking at them, you had no idea whether there was a
12 birefringent particle in the tissue, correct?

13 A That's correct.

14 Q Okay. So you had no idea whether in those
15 99 percent of cases, there was any talc involved at all,
16 right?

17 A Correct.

18 Q Okay. All right.

19 All right. So in about 1 percent of the cases
20 that you base your experience on, you did actually use a
21 PLM, correct?

22 A Yes.

23 Q Okay. But in those cases, you weren't looking
24 for cosmetic talcum powder particles, right?

25 A I was looking for foreign particle. It's

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3874

1 impossible using the instruments that I use routinely to
2 identify the composition of that particle. So I can't
3 say that it's talc or that it's not talc.

4 Q So in 99 percent of cases, you didn't use PLM.
5 The 1 percent that I have up here, you weren't looking
6 for cosmetic talcum powder particles, right?

7 A I was looking for a foreign particle.

8 Q Okay. But it wasn't cosmetic talcum powder
9 particles that you were looking for? It's a very simple
10 question.

11 A It could have been.

12 Q But it wasn't, Dr. Felix. That's my question.

13 Was it or was it not?

14 A I never found a particle that I would suspect
15 was talcum powder associated with a foreign body
16 reaction in an ovary.

17 Q And that's because you never went looking for
18 it, right?

19 A No, absolutely not. That's an incorrect
20 statement. I said it very carefully. I look at every
21 foreign body reaction with polarized light microscopy.
22 If there is no foreign body reaction, then that particle
23 wasn't there during the vital --

24 Q That's not my question, Dr. Felix.

25 MS. DIOLOMBI: Your Honor, may he finish his

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3875

1 answer?

2 THE COURT: I think he did.

3 BY MR. OLIVER:

4 Q Dr. Felix, my question is very simple.

5 When you went in that 1 percent of case that
6 is Johnson & Johnson was not paying you as an expert --
7 I understand what you do in courtrooms, but when you
8 were in your lab just doing your job, in those 1 percent

9 of cases, you were not intentionally looking for
10 cosmetic talcum powder particles. That's not why you
11 were using the PLM, true?

12 A I was intentionally looking for any particle,
13 which may have included talc.

14 Q But you weren't intentionally looking for
15 talcum powder particles?

16 MS. DILOMBI: Objection.

17 THE COURT: Overruled.

18 BY MR. OLIVER:

19 Q Can you give me a yes-or-no answer to my
20 question?

21 A Yeah. Yes, I was looking for anything, any
22 particle, including the possibility of a talc particle.

23 Q Dr. Felix, let's move to the next opinion.

24 So you are aware that Dr. Sitelman identified
25 inflammatory macrophage reactions for the jury in this

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3876

1 case. Were you aware of that, on the slides?

2 A I'm not sure I understand your question.
3 Inflammatory macrophage reactions?

4 Q Let me do this: You weren't here when he

5 testified, true?

6 A I was not here.

7 Q Okay. Did you review his testimony in this
8 case?

9 A I did not.

10 Q Okay. So you don't know what he told the
11 ladies and gentlemen of the jury, correct?

12 A I'm sorry, I misspoke. I did start reading
13 Dr. Sitelman's trial testimony, but I didn't get very
14 far into it.

15 Q Okay.

16 A And I don't know -- I got stuck in whatever
17 you guys do to qualify us.

18 Q Dr. Felix, you didn't read his full trial
19 testimony?

20 A I did not.

21 Q So if Dr. Sitelman got up and identified for
22 the ladies and gentlemen of the jury macrophages on the
23 screen in Marilyn Seskin's tissue slides, you don't know
24 anything about what he did there, right?

25 A No, but I'm not claiming that there weren't

1 macrophages in Dr. Seskin's tissues.

2 Q I understand that. My question was: You
3 don't know what he showed the ladies and gentlemen of
4 the jury in this courtroom, do you?

5 A You're correct, I do not.

6 Q Okay. Now, you do agree that talc causes
7 inflammatory reactions in the human body, right?

8 A Correct.

9 Q And when we're talking about macrophages and
10 foreign particles, one of the things that happens in the
11 body is that the body's own cells will -- and I don't
12 know, I can't remember which type of cell does this --
13 will try to remove the particle, correct?

14 A Yes.

15 Q Okay. Which cell is that that tries to remove
16 the particle?

17 A It can be either a macrophage or a foreign
18 body giant cell.

19 Q And another thing that can happen is the body
20 can dissolve those particles, whatever they are,
21 correct?

22 A It can dissolve it over a period of many, many
23 decades.

24 Q Okay. Do you know what the biopersistence of
25 a talc particle is in a women's tissue? Did you have an

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3878

1 opinion about that?

2 A There is no literature that quantifies the
3 dissolution time in a person. There is literature in
4 experimental models that set conditions similar to the
5 human body, but not inside the human body.

6 Q Well, Dr. Felix, did you know, for example,
7 that there are peer-reviewed articles that say that a
8 fiber of chrysotile asbestos will dissolve in the human
9 body within less than a year? Did you know that?

10 MS. DILOMBI: Objection, Your Honor,
11 speculative.

12 THE COURT: Overruled.

13 The question is: Do you know?

14 BY MR. OLIVER:

15 Q Do you know that?

16 A No, I do not.

17 Q You don't have any information,
18 scientifically, about how long it takes a macrophage to
19 clear a talcum powder particle from the human body, do
20 you?

21 A I don't understand the term "clear."

22 Q Okay. Would you like to go to page 41 of your
23 deposition, Dr. Felix?

24 A Sure.

25 Q Okay. If you'll turn with me to line 6, I ask

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3879

1 you the identical question: "Do you have any
2 information, scientifically, about how long it takes
3 macrophages to clear talc particles from tissue into the
4 lymphatic system?"

5 And you responded: "I don't think -- I'm not
6 aware of any study that could accurately determine
7 that."

8 Was that your answer then?

9 A It was.

10 Q Okay. And is that your answer today?

11 A Yes.

12 Q And I want to be clear: You are not
13 testifying that the particles in Marilyn Seskin's tissue
14 are not talc. You are not offering that testimony,
15 right?

16 A I am not.

17 Q You cannot -- you believe this is

18 contamination, but you can't tell us where in the
19 environment that came from, right?

20 A Yes, I can.

21 Q Well, why don't you get your deposition from
22 December 4, 2023. Here you go, Dr. Felix.

23 Okay. So my question is: You cannot identify
24 where these particles came from, right?

25 A I cannot identify where a single particle came

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3880

1 from. They have multiple places --

2 Q Okay. Well, why don't you take that
3 December 4, 2023 depo and go to page 152, line 16
4 through 24, with me. Tell me when you're there.

5 A I am.

6 Q Okay. I asked the question: "And you cannot
7 identify the place in the environment that it came
8 from?"

9 There is an objection.

10 And I said: "It's just a yes or no."

11 And you said: "Correct."

12 And then I said: "You didn't actually do
13 anything to figure that out, did you?"

14 And you said: "I did not."

15 Right?

16 A Correct.

17 Q Okay. And that was your answer then, right?

18 A Correct.

19 Q And that's your answer now, right?

20 A Yes.

21 Q Okay.

22 MR. OLIVER: I don't have anything further,

23 Dr. Felix.

24 THE COURT: Redirect?

25 MS. DILOMBI: Your Honor, may I inquire?

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3881

1 REDIRECT EXAMINATION

2 BY MS. DILOMBI:

3 Q Let's take a look at Dr. Sitelman's deck of

4 pictures that he took, 25 pictures that he took.

5 Counselor asked you about Dr. Sitelman finding a

6 macrophage. You looked at everything Dr. Sitelman took

7 photos of, correct?

8 A Yes.

9 Q Did you see any evidence of a macrophage

10 engulfing a particle in any of the Dr. Sitelman's
11 slides?

12 A I did not.

13 Q All right. If talc was in Ms. Seskin --
14 Dr. Seskin's tissue, would it have been required to have
15 a foreign body tissue reaction?

16 A Absolutely, yes.

17 Q Did you see any particle with a foreign body
18 reaction, even looking at Dr. Sitelman's slides?

19 A I did not.

20 Q And how did that impact your opinion?

21 A Well, if there is no foreign body reaction,
22 then there was no exposure of talc to Marilyn Seskin's
23 tissues while those tissues were in her body.

24 Q Okay. Why do you not believe it's possible
25 for talc to migrate to the ovaries?

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3882

1 A Because it's extremely difficult for a
2 particle like that to survive the trip from the perineum
3 through the vulva, into the vagina. The mechanism for
4 transport is nonexistent. It's not a motile particle.
5 It doesn't move.

6 If there are studies using beads, they are
7 much different than talc. But, more importantly, the
8 most important reason is that I have seen maybe 20,000
9 pairs of ovaries, I've looked at them under a
10 microscope, and I have not seen a foreign body reaction
11 containing a particle that would possibly be talc. I
12 know that a minimum of 10 percent of those women used
13 perineal talc, meaning applied --

14 MR. OLIVER: Objection, Your Honor, this is
15 undisclosed.

16 THE COURT: Sustained.

17 MS. DILOMBI: All right. I have no further
18 questions. Thank you.

19 THE COURT: Ladies and gentlemen, do you have
20 any questions of this witness?

21 Rod, can you help me, please.

22 (The jurors exited the courtroom.)

23 THE COURT: Any objection from the plaintiff?

24 MR. OLIVER: Yes.

25 THE COURT: To which one?

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3883

1 MR. OLIVER: The first one, and there is one

2 that's cumulative, but that's fine.

3 THE COURT: Your objection is to: Does each
4 and every foreign body response stay in the body
5 forever?

6 MR. OLIVER: Well, he is right there. He
7 already said he couldn't do that. When I asked him
8 about dissolution of particles, he wasn't able to
9 answer that question.

10 MS. DILOMBI: That was not his testimony.

11 THE COURT: I'm going to allow it.

12 Any other objections? That's it?

13 Rod, can you get the jury for me, please.

14 (The jury enters the courtroom.)

15 THE COURT: All the jurors are present. All
16 the parties are present. The witness is on the
17 witness stand.

18 "Sir, does each and every foreign body
19 response stay in the body forever, or does the
20 human body have a mechanism for breaking down or
21 otherwise removing the foreign body response over
22 time?"

23 THE WITNESS: So the particle -- no particle
24 will stay forever, if the person lives for a very
25 long time. You are correct. There is a mechanism

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3884

1 of the human body to dissolve particles, including
2 talc, but it takes a very, very long time.

3 So in that example that I gave you,
4 pleurodesis, 20 years there was a ton of talc left.
5 But it is possible for the macrophage, with its
6 internal enzymes, to degrade the talc to the point
7 where it dissolves.

8 THE COURT: Thank you.

9 "Have you witnessed talc powder on an ovary in
10 your life?"

11 THE WITNESS: Yes, I have. So I'm old enough
12 to have lived through the period of time when women
13 had very bad symptoms in their pelvis because the
14 surgeons used talcum to lubricate the gloves. They
15 used talcum to make hands be able to go into the
16 gloves earlier.

17 Even though they tried to wipe off the excess
18 talc, some of the times, there was talc that fell
19 into the pelvis, and it caused adhesions, which
20 caused pain and infertility. So I was a
21 pathologist during the time when I saw those.

22 THE COURT: "If you would have identified a

23 foreign body, would you have tried to identify it,
24 if it was talc, and report it?"

25 THE WITNESS: So if I had seen a foreign body

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3885

1 reaction with a particle in it, I would basically
2 inform the attorneys that I found a foreign body
3 reaction to a particle.

4 However, I, myself, do not have the expertise
5 or the instrumentation to determine whether it's
6 talc, but I would hope that somebody would have
7 done that, yes.

8 THE COURT: "Isn't it true that sperm and STDs
9 can migrate up the reproductive tract, up to the
10 ovaries? If these things can migrate up, why
11 couldn't talc do the same?"

12 THE WITNESS: So both sperm and sexually
13 transmitted infections have evolved in order to do
14 that exact same thing, that specific action,
15 meaning sperm are motile. At the time of
16 fertility, the mucus in the cervix is very soft and
17 runny and a perfect vehicle for that sperm to move
18 through it.

19 Chlamydia, gonorrhea, they achieve that
20 purpose not by migrating, but by dividing. So they
21 divide until they fill up, and they climb the
22 genital tract by dividing. The actual bacteria
23 doesn't move. It just divides and creates a chain
24 of bacteria.

25 Both sperm and bacteria are biological. They

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3886

1 don't stick to things. Unlike talc, where if you
2 put talc on a moist surface, that talc is not going
3 to move.

4 THE COURT: Defense, any questions based upon
5 those questions?

6 BY MS. DILOMBI:

7 Q Dr. Felix, does a foreign body response to
8 talc remain in the body for decades?

9 A Yes.

10 MS. DILOMBI: That's it.

11 THE COURT: Plaintiff, any questions?

12 MR. OLIVER: I don't think I have any
13 questions, Your Honor.

14 THE COURT: Thank you, sir. You may step

15 down.

16 (Witness excused.)

17 THE COURT: All right. Defense, call your
18 next witness.

19 MS. DIOLOMBI: We have no further witnesses.

20 THE COURT: Thank you.

21 We'll be in recess for lunch. Hand your
22 notepads to Brandon on your way out. Remember, you
23 still cannot discuss the case amongst yourselves or
24 with anyone else.

25 We'll see you-all back here at 2:15 p.m. It's

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3887

1 1:20 p.m. now. So it's, like, 55 minutes for
2 lunch.

3 (The jurors exited the courtroom.)

4 THE COURT: Plaintiff, are you calling anybody
5 by way of rebuttal?

6 MR. OLIVER: No, Your Honor, we're not calling
7 anybody.

8 THE COURT: All right. Let's talk about the
9 jury instructions. Let's get a final copy of
10 those.

11 MR. PENDELL: Your Honor, I think we've agreed
12 on the verdict form. Let me just verify, but I
13 think we're agreed.

14 THE COURT: All right. What about the jury
15 instructions?

16 MR. LEPPERT: We are printing out a cleaned-up
17 version, but I think we also have agreement on
18 that.

19 MR. PENDELL: I think that's correct, Your
20 Honor.

21 THE COURT: Okay. If that's the case, then
22 we'll come back here, I guess, in about 30 minutes,
23 and we'll do directed verdict and punitive damages.

24 Oh, I'm sorry, I do want to ask this: Does
25 anybody intend to present any additional evidence

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3888

1 as to the sufficiency of the punitive damages
2 award, separate and apart from what I heard during
3 the trial proceedings?

4 Plaintiff?

5 MR. OLIVER: No, Your Honor, we stand on our
6 papers and our previous --

7 THE COURT: Defense.

8 MR. LEPPERT: No, Your Honor.

9 THE COURT: Okay. All right. And I'll give
10 you a chance to make whatever argument you want to
11 make when we get back. And then I'll give you my
12 thoughts, and we'll do the directed verdict. We
13 may need to make adjustments, depending upon the
14 directed verdict.

15 What is that?

16 MR. RAYFIELD: A new verdict form.

17 THE COURT: This is agreed?

18 MR. RAYFIELD: Yes.

19 MR. LEPPERT: Subject to our prior objections.

20 THE COURT: Agreed, subject to all prior
21 objections that were raised. Okay.

22 MS. BROWN: Your Honor, in terms of timing,
23 the Court will charge the jury before closing?

24 THE COURT: I don't care. I'll do it before
25 or after. I normally do it after.

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3889

1 MR. OLIVER: We are happy for the Court to do
2 it after. We think that's probably better. I

3 wasn't sure whether there was a rule that required
4 it or not, but if you can do it after, I say let's
5 do it after.

6 THE COURT: Well, we didn't do anything the
7 way the rules would require. We would have given
8 them a whole set of instructions at the very
9 beginning, where we would have given them what the
10 theory of the case was, with all of that. And so
11 I'm going to do it the way I always do it, which is
12 after you-all do your closing arguments.

13 Anything else?

14 All right. We'll see you-all back here -- the
15 jury is coming back at 1:15 p.m., so we'll see you
16 back here at ten minutes till 2:00.

17 (A recess was taken at 1:24 p.m. and the
18 proceedings resumed at 1:53 p.m.:)

19 THE COURT: Plaintiff is present. Defense is
20 present.

21 Defense, directed verdict?

22 MR. LEPPERT: Yes, Your Honor, I think we'd
23 like to front load the argument and focus heavily
24 on the punitive damages. Ms. Scott will be doing
25 the argument on the punitive damages.

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3890

1 THE COURT: Okay. My first question -- all
2 right. I just want to make sure we are all talking
3 about the same thing. What I read is that "In
4 subsequent civil actions involving the same act or
5 single course of conduct for which punitive damages
6 have already been awarded, if the court determines
7 by clear and convincing evidence that the amount of
8 prior punitive damages awarded was insufficient to
9 punish the defendants' behavior, the court may
10 permit a jury to consider an award of subsequent
11 punitive damages."

12 My question is, first of all: We all know
13 that the standard is clear and convincing evidence,
14 but does somebody bear the burden?

15 MS. SCOTT: Yes, Your Honor, and that's the
16 plaintiff. The plaintiff bears the burden to
17 present clear and convincing evidence that the
18 \$1.6 billion punitive damages awards, which is one
19 of the --

20 THE COURT: Where does it say that the
21 plaintiff bears the burden?

22 MS. SCOTT: So that is in one of the cases
23 that we cited to the Court.

24 THE COURT: Do you agree it's your burden?

25 MR. OLIVER: I don't agree with that exactly,

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3891

1 Your Honor. They have the burden of coming forward
2 with the evidence that there were punitive damages
3 awards. In terms of who bears the burden on that,
4 I'm not sure which case she's talking about. So I
5 don't think that's right.

6 MS. SCOTT: We bear the burden of -- you
7 should have your own copy without my notes.

8 MR. OLIVER: I'm not trying to look at your
9 notes.

10 MS. SCOTT: We bear the burden to establish
11 that we made a prior award, Your Honor. We've done
12 that, and this Court has already ruled that we have
13 paid a prior punitive damages award.

14 The burden then shifts on the exception, which
15 is where we are now, for plaintiff to bring forward
16 clear and convincing evidence that that
17 \$1.6 billion that we've already established we've
18 paid was insufficient.

19 THE COURT: Well, I thought the 1.6 wasn't the

20 punitive damages portion of it?

21 MS. SCOTT: It was, Your Honor.

22 MR. OLIVER: No, it was actually divided. It
23 was about 700-and-something against Johnson &
24 Johnson, 700-and-something against JJCI.

25 THE COURT: Okay. All added up together, it

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3892

1 was 1.6?

2 MR. OLIVER: I agree.

3 THE COURT: Go ahead.

4 MS. SCOTT: And so where we are now, Your
5 Honor, based upon your ruling, you have ruled that
6 the statute applies to J&J.

7 THE COURT: I want to get to the specifics.
8 Tell me why it is that the evidence that has been
9 presented during this trial is -- or why the
10 plaintiff has failed to establish by clear and
11 convincing evidence that the prior \$1.6 billion
12 award is insufficient or inadequate?

13 MS. SCOTT: Your Honor, so the plaintiff
14 relies on two things. One is net worth, and the
15 net worth consideration, one, is constitutional

16 suspect, as outlined in our briefs and as
17 articulated by the U.S. Supreme Court.

18 THE COURT: I don't know that means.

19 MS. SCOTT: It mean it's on shaky grounds.

20 THE COURT: You didn't put any evidence to
21 contradict the net worth.

22 MS. SCOTT: No, we have not. The numbers are
23 what they are, but your decision cannot be based
24 solely on our net worth.

25 THE COURT: I don't think it can be solely on

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3893

1 your net worth, but I think it's one of the myriad
2 of factors that I can consider, and their argument
3 is that it's only .4 -- even taking their number,
4 the \$1.6 billion, the \$1.6 billion is .4 percent of
5 the overall net worth of your company.

6 MS. SCOTT: Your Honor, there is also -- on
7 the net worth, we did put in evidence, Your Honor,
8 that the consumer business, which the baby powder
9 is a part of, or was a part of, Your Honor, was
10 only half a percent of J&J's overall net worth.

11 THE COURT: I know you did that, but I know

12 the relevance of that.

13 MS. SCOTT: The relevance, Your Honor, to
14 other courts have been that they have looked at the
15 net worth or the profits from the product instead
16 of looking at the overall net worth of --

17 THE COURT: I know, but where does that come
18 from? For example, are you telling me that if you
19 are a big company and you manufacture a defective
20 product, but you also manufacture a lot of other
21 things that have not been alleged to have been
22 defective, or nobody knows, that the Court has to
23 somehow parse out what percentage of your profits
24 are from the defective product and only look at
25 punitive damages from that perspective as compared

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3894

1 to the overall financial net worth of your company?

2 MS. SCOTT: And Your Honor, so there are only
3 a handful of courts who have interpreted this
4 statute, okay? And one of those courts who
5 interpreted this statute under this exception --

6 THE COURT: A trial court or appellate court?

7 MS. SCOTT: It's a trial court, Your Honor,

8 because, unfortunately, there's limited cases on
9 interpreting insufficiency, and so the guidance
10 that we have presented to the Court --

11 THE COURT: I know, but it makes no sense to
12 me that I'm supposed to just look at just the
13 portion of your company, the value of your company
14 limited to the product that was defective or the
15 product that was alleged to have been defective.
16 I'm not doing that.

17 I'm looking at the full value of your company,
18 and because -- that's the only thing that makes
19 sense to me. Because otherwise, what you're
20 basically saying is that, "Well, if you look at how
21 much of the company was devoted to the production
22 of talc, well, then that award is more than
23 adequate." Well, yeah, but the overall value of
24 your company, it has to be punitive.

25 MR. OLIVER: Your Honor --

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3895

1 THE COURT: One minute.

2 MS. SCOTT: And Your Honor, I take your point
3 and I understand your point, but I would also point

4 out that when we are looking back at this
5 statute -- I know we all have in the background the
6 punitive damages sufficiency consideration
7 generally, but when we're looking at this statute,
8 the legislature has specifically said what course
9 they're supposed to look at when they're making
10 that determination of insufficiency. And as we
11 know from well-established canons of statutory
12 construction, if the legislature puts in something
13 and doesn't lift something up --

14 THE COURT: I'm sorry, what does the
15 legislature list in the statute?

16 MS. SCOTT: The legislature listed for courts
17 to consider whether or not the conduct at issue had
18 ceased. And there is evidence, clear and
19 convincing evidence, undisputed, that we stopped
20 selling talc-based products.

21 THE COURT: When?

22 MS. SCOTT: In 2020.

23 THE COURT: Okay. I understand that. You
24 stopped selling it in 2020; when did you get your
25 punitive damages award?

1 MS. SCOTT: I believe that was in 2015.

2 THE COURT: So you continued to sell the
3 product for five years after there was a punitive
4 damages award that was levied against you? And
5 that's supposed to be considered mitigating towards
6 against additional punitive damages because you
7 stopped producing the product?

8 MS. SCOTT: Absolutely, Your Honor. During
9 that time period, we were appealing -- which was,
10 actually, I think more than a \$4 billion punitive
11 damages award. We were appealing that award with
12 the Missouri appellate courts, with the Missouri
13 Supreme Court, and we also took it up to the U.S.
14 Supreme Court, but in the meantime, in between the
15 Missouri Supreme Court's decision and the U.S.
16 Supreme Court's decision, we made the decision to
17 stop selling talc-based powders. And we had that
18 testimony come in from --

19 THE COURT: But it took you five years to make
20 that decision.

21 MS. SCOTT: We were exercising our
22 constitutional right to an appeal, what we thought
23 was an excessive --

24 THE COURT: No, no, no, you have a

25 constitutional right, nobody can fault you for

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3897

1 that, but you also could have looked at the
2 evidence that was there and you could have made a
3 decision voluntarily to simply cease the product
4 that juries have already determined was defective.
5 But instead, arguably could be made, that you
6 persisted in saying there is nothing wrong with our
7 product. Everything about our product is safe.

8 MS. SCOTT: We maintain that to this day, Your
9 Honor.

10 THE COURT: And you do, and I think that may
11 be the reason why additional punitive damages may
12 be warranted, because it doesn't appear that you
13 are even remotely remorseful for any of the conduct
14 that you have been alleged or have been found to
15 have been involved in. And if you show absolutely
16 no remorse, if you show absolutely no action of
17 redemption, why can't that be something the Court
18 considers in terms of whether or not the original
19 award was adequate in order to deter this type of
20 behavior and in the future?

21 And by the way, I disagree with you. I don't
22 think -- you make products that -- you may no
23 longer be taking talc products, I don't know what
24 other products you make, and I don't know if
25 there's any allegations related to them, but I

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3898

1 think it's not just sending a message to you in
2 terms of what you do because punitive damages are
3 not always limited to you, it's the adequacy as it
4 relates to the overall behavior that you have
5 engaged in.

6 MS. SCOTT: Punitive damages are tied to
7 conduct, Your Honor, and what the Courts have
8 looked at when they've looked at whether or not the
9 conduct has ceased -- and by the way, we have cited
10 the court cases where the conduct hasn't ceased and
11 the court still found that the prior punitive
12 damages awards were sufficient as a matter of law.

13 But in any event, the conduct has ceased. It
14 ceased four years ago. And so what I'm hearing the
15 Court -- and maybe I'm misunderstanding what the
16 Court is saying -- but what I think I'm hearing

17 from the Court is that we should be punished for
18 conduct that's unrelated to the baby powder
19 products.

20 THE COURT: No, I'm not. You never heard me
21 say that. I didn't say that. What I said was you
22 went to trial on more than one occasion and a jury
23 found that your product was defective. You
24 discontinued the product, and you say you didn't
25 discontinue the product because you thought it was

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3899

1 defective and the allegations against you were
2 true, you discontinued the product because you
3 were -- I think your word was you were receiving
4 calls into your call center and you were concerned
5 for your consumers. That's what I thought I heard
6 you say on the record, at least when you all were
7 arguing this issue with me.

8 In fact, I think your co-counsel took
9 exception, they were suggesting that somehow the
10 Court was suggesting that you didn't care about
11 your customers. And I wasn't suggesting that.

12 And so the evidence, as I understand it, is

13 that you got a \$1.6 billion punitive damages award
14 and you have never, ever acknowledged that there is
15 anything wrong with your product, even to this day.
16 You continue to persist that your product is
17 100 percent safe, it didn't require any warnings,
18 and if a jury -- if a jury, as the jury that
19 awarded the \$1.6 billion against you, if this jury
20 could also conclude, or this Court can say by clear
21 and convincing evidence, that all you're doing is
22 persisting in the wrongful conduct, the wrongful
23 behavior, you haven't learned anything.

24 MS. SCOTT: All of the conduct in this case
25 happened prior to us making the decision to stop

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3900

1 selling talc-based powders. And if we look at the
2 clear words of the statute, all it says is: Has
3 the act or course of conduct ceased? And it has
4 ceased, Your Honor.

5 The whole purpose of that, if there is nothing
6 to punish, it's already been punished by the
7 \$1.6 billion award and there is nothing to deter
8 going forward.

9 THE COURT: Not buying it. Not accepting it.

10 MS. SCOTT: So the other ruling Your Honor has
11 made in this case is that the \$1.6 billion set-off
12 is going to apply.

13 THE COURT: I don't want to go there yet. You
14 are absolutely right, but I need to stick to --
15 there's two things I need to do. Because if I
16 never get past the sufficiency, we don't get to the
17 set-off.

18 MS. SCOTT: Well, Your Honor actually doesn't
19 have to make a sufficiency determination under the
20 statute.

21 THE COURT: I don't have to, but I'm going to.
22 I think the law requires me to make a decision, and
23 you-all told me that I am required to make decision
24 to determine whether or not I find the previous
25 award, punitive damages award, was adequate by

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3901

1 clear and convincing evidence. And I'm going to
2 make a finding.

3 MS. SCOTT: Understood, Your Honor, but the
4 statute says "if" and "may" and courts have

5 interpreted that to say that the court has broad
6 discretion.

7 THE COURT: I'm telling you I'm making the
8 finding.

9 MS. SCOTT: So if Your Honor is going to make
10 the finding, I think I understand where the Court
11 might be going on that, we would ask that that
12 finding at this point be a thumbs up or a thumbs
13 down, and that any specific findings if they need
14 to be made --

15 THE COURT: I've got them all written out.
16 It's up to you. I can read them to you on the
17 record or I can hold off and -- but I want to make
18 it clear because I am making a finding that it's
19 insufficient and I have very specific reasons as to
20 why and I don't really care how you want to do it.

21 We can either do it -- I announce it on the
22 record and I tell you specifically what I think, or
23 you can say, "We understand, Judge, that you are
24 going to make that finding and we just prefer -- we
25 don't agree, but we accept that that's the finding

1 that you are going to make and it will be the
2 finding that governs us going forward, but you
3 don't have to orally pronounce all those findings
4 at this time on the record." And I'm okay with not
5 doing that.

6 MS. SCOTT: We would prefer that you didn't
7 orally announce those specific findings on the
8 record at this time, but if the Court has made its
9 decision on sufficiency, we would just like to
10 present the new argument that we've made about
11 futility in light of your ruling.

12 THE COURT: But I have to hear from them, if
13 there is anything you wish to say.

14 MR. OLIVER: On the sufficiency issue?

15 THE COURT: Yes.

16 MR. OLIVER: I think you've covered it, Your
17 Honor.

18 THE COURT: Okay. Now, the second issue is
19 the issue on whether or not it even makes sense
20 that the jury be allowed to make a decision in
21 regard to punitive damages in light of any award of
22 punitive damages have to be tied to the specific
23 acts that are alleged in this case and whether or
24 not under what circumstances this Court would even
25 countenance an award of punitive damages in excess

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3903

1 of \$1.6 billion.

2 MS. SCOTT: And that's the issue, Your Honor,
3 and we believe that just as a matter of law, any
4 award that really came close, but exceeded that
5 \$1.6 billion prior punitive damages award in a
6 single plaintiff case, or any case, would be
7 constitutionally invalid. And so by sending this
8 issue back to the jury, it really is a futile
9 exercise that is prejudicial.

10 THE COURT: How? Prejudicial how?

11 MS. SCOTT: So the U.S. Supreme Court and
12 others have acknowledged how punitive damages
13 award -- excuse me, the punitive damages issue -- I
14 just want to make sure I have this up so that I
15 have it. I don't want to misquote the Supreme
16 Court, but as the Supreme Court has said, punitive
17 damages pose an acute danger of arbitrary
18 deprivation of property from defendants and it
19 creates the potential that juries will use their
20 verdicts to express biases against big businesses,
21 particularly those without strong local presence.

22 And so by sending this question back to the
23 jury, that really is a futile exercise because no
24 award, punitive damages award that comes out of
25 that verdict is going to be able to withstand

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3904

1 judicial scrutiny. It's a futile exercise, it's
2 prejudicial, and that prejudice is avoidable given
3 the fact that there is no way for a
4 constitutionally valid award to come out.

5 THE COURT: I don't understand, ma'am. Under
6 your logic then, any time the court finds that the
7 punitive damages award in a previous case was
8 insufficient, the court should not permit -- if the
9 court does not believe -- let me rephrase -- if the
10 evidence doesn't seem to suggest that an award of
11 punitive damages that matches the previous damage
12 award will be upheld as a matter of law, not that
13 the jury wouldn't find it, but it just can't be
14 upheld as a matter of law, then the court should
15 not permit the jury to consider the punitive
16 damages award.

17 MS. SCOTT: Yes, Your Honor, and other courts

18 have done that. We've cited it to you in our
19 papers.

20 THE COURT: Trial courts?

21 MS. SCOTT: Trial courts, and Your Honor
22 actually has an order where it wasn't on trial, but
23 where a plaintiff moved to add a punitive damages
24 award claim to their petition where a prior award
25 of \$565 million had been made, Your Honor said,

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3905

1 based on the statute and based on Sheffield, said
2 no, you cannot amend your petition in order to add
3 this punitive damages claim. It was a summary back
4 and forth and that we cited to you in our papers.

5 In addition, appellate courts, the Martin
6 court and the Sheffield court as well acknowledged
7 that as a practical matter, it didn't make sense
8 for send a case back for a punitive damages
9 determination because as a practical matter, there
10 was no way for the plaintiff to get a punitive
11 damages award that would be in excess of the prior
12 punitive damages award.

13 So this is a futile exercise given the fact

14 that we are talking about \$1.6 billion. There's
15 been the highest, I think, punitive damages award
16 in the state was \$30 million, and several appellate
17 courts have wiped out awards that were multiples
18 lower than what we are talking about here today.

19 So it just doesn't make any constitutional
20 sense, and Your Honor, the last time we talked
21 about this a week ago, as you were thinking about
22 how this offset was going to operate in this
23 manner, you yourself said, "Why should I send this
24 back to the jury?"

25 You invited us to provide some guidance on

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3906

1 that, we did in our papers, and I think it's very
2 telling that we have now two submissions from
3 plaintiff that don't even really address this
4 futility argument.

5 THE COURT: Well, there's a couple things.
6 One is that I say a lot of things when we're having
7 conversations, but until I make a final decision,
8 it's just me talking out loud. It's my process.
9 Lawyers always say, "Well, Judge, you said this."

10 Yeah, I said it, and I'm not saying I didn't
11 say it, but that wasn't a final decision that I
12 made. I talk out loud and that's how I'm
13 processing it as I'm talking.

14 And I'm going to ask them the same question:
15 Why should I send it?

16 MR. OLIVER: Well, Your Honor, I'm always
17 amazed. Whenever the statutory language is against
18 me, I get an argument that we have to do this, the
19 statutory language says it. In a situation where
20 the statutory language is purely in favor of my
21 argument, I get a lot of policy arguments.

22 The statutory scheme under this statute
23 prescribes it just the way Your Honor is going to
24 do it. It doesn't say you offset it beforehand, it
25 says you do exactly what Your Honor has done, you

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3907

1 make your findings of fact, you make your
2 announcement, however you're going to do it, it
3 goes back to the jury, and then there is an offset
4 and that's how it works. So it would be premature,
5 number one, and against statutory scheme.

6 Number two, I have made an argument, I
7 understand that we have gone back and forth about
8 this argument, that LTL is a completely new
9 company, that Johnson & Johnson created that
10 company to avoid liability. It's a totally
11 different company, right? And I have the right at
12 some point, if they award money against LTL -- they
13 may not, but if they do, then that's a ripe issue
14 for appeal. And I think that the way --

15 THE COURT: That's fair, but by the way, I'm
16 not changing my position on that. I think the
17 previous decision I made with regard to LTL, I
18 think the defense is 100 percent correct. I don't
19 think you get to argue on one hand that LTL is a
20 wholly different company that is responsible for
21 the liabilities of them, but they are separate for
22 the purposes of punitive damages. That, to me, is
23 just nonsense.

24 MR. OLIVER: And I heard Your Honor's ruling,
25 and if we go forward exactly the way Your Honor

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3908

1 planned, all of that is perfectly preserved. The

2 verdict form perfectly preserves it, the punitive
3 damages, and we can --

4 THE COURT: But what if I'm wrong and the
5 Third actually reverses me and then we would have
6 to come back and do the trial all over again?

7 MR. OLIVER: Reverse you on which point?

8 THE COURT: I'm saying it in favor of you, you
9 may not realize it, but if, in fact, I don't allow
10 the jury to consider punitive damages and the Third
11 District Court of Appeal says, "Judge Thomas, LTL
12 should have been considered a separate company," I
13 have no idea under what circumstances they would do
14 that, but I've said that before and been reversed,
15 okay? If I don't allow it, then the Third would
16 say, "Well, we are forced to send it back because
17 of" -- well --

18 MR. OLIVER: That's exactly the argument we
19 made in our briefs. We made it multiple times.
20 That is the route that makes the most sense. It's
21 consistent with the statute and it also preserves
22 these issues in the appropriate manner.

23 THE COURT: Anything else you want to say,
24 ma'am?

25 MS. SCOTT: I think that's it, Your Honor. I

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3909

1 think it really is a futile exercise. We've
2 provided cases that would countenance and approve
3 of this answer to resolve the issues you presented
4 last week, why should we even send this issue to
5 the jury, and also, your concerns about commenting
6 on the evidence.

7 THE COURT: Well, you're right, I don't want
8 to give the plaintiffs ammunition for their closing
9 argument, to be quite candid. That's the only
10 reason I asked the question that I did, because I
11 said, well, how specific do I have to be?

12 Because I said some things here, and my
13 thought is, "Okay, if I say that" -- and by the
14 way, I'm not sure really it prejudices you that
15 much because these are all the things that you said
16 I should have said at the beginning of the trial,
17 before the trial began.

18 And you said, "These are the things, Judge
19 Thomas, you should have made these findings at the
20 beginning of the trial." So me saying them now,
21 when you say I should have said them at the
22 beginning of the trial, I don't know how anybody is

23 at a disadvantage because now that I've heard all
24 of this evidence, now I'm saying them, but I'm
25 willing -- because of the way that we proceeded

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3910

1 that you did not agree with.
2 But I'm willing to just simply say that I will
3 put my findings -- I will reduce my findings to
4 writing and I won't orally announce them now by
5 agreement so there is no defect in the fact that
6 the Court has not made its finding that the
7 sufficiency, or lack thereof, by clear and
8 convincing evidence has not been established, or
9 the insufficiency has been established, however you
10 want to look at it, by the clear and convincing
11 evidence. Then I will not make my findings and I
12 will submit punitive damages to the jury for their
13 full consideration.

14 What's as to the directed verdict?

15 MS. SCOTT: Your Honor, one point on the
16 specific findings, and obviously we can talk about
17 this later on after the verdict, but I think if
18 it's the case where either no punitive damages are

19 awarded, or they are completely consumed by the
20 prior punitive damages award, I think that the
21 issue of issuing specific findings would be a moot
22 point.

23 THE COURT: But, unfortunately, there is an
24 appeal, okay, and I can't just -- now I know the
25 way this works because somebody, the same way you

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3911

1 quoted to me the trial judge in those other
2 opinions, somebody is going to take what I say, the
3 plaintiffs are going to sit up here and quote it
4 and say, "Judge Thomas out of Miami said this," I
5 get it. But I think I'm required to do it because
6 I think that's what the rules say I'm supposed to
7 do.

8 So I'm not going to not do it simply because
9 somebody could parade it around later and use can
10 it for some unintended purpose that I'm not
11 agreeing to or I'm not consenting to, but it is
12 what it is.

13 Directed verdict.

14 MR. LEPPERT: Your Honor, one issue. I think

15 we can rest on the papers with respect to the
16 majority of them, but I think the one issue we
17 deferred and we would like to address before this
18 goes back to the jury is the medical expenses, and
19 the issue on the medical expenses is such there was
20 no testimony as to reasonableness and necessity.
21 Albertson versus Brady is the Second DCA opinion
22 that such testimony --

23 THE COURT: You guys got to be quiet, please,
24 so our court reporter can hear counsel's argument.

25 MR. LEPPERT: Albertson versus Brady is the

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3912

1 case from the Second DCA requiring testimony about
2 the reasonableness and the necessity of the bills.

3 The second ground is that they moved in a
4 summary of \$733,000. There is a Fifth DCA opinion,
5 Bilomento, which holds that the summary itself
6 cannot constitute the evidence unless the
7 underlying records are also -- the underlying bills
8 that support the summary are also moved in.

9 And so we have two independent grounds why
10 there is not a basis for an instruction on verdict

11 form and interrogatory on that one.

12 MR. OLIVER: Your Honor, let me clarify.

13 Appellate counsel may not be aware that his trial
14 counsel agreed to this in terms of the summary, and
15 Your Honor will recall the reason it was agreed to
16 is because the basis for it was EOB documents that
17 cannot possibly be sanitized under the collateral
18 source rule. We talked to defense counsel, they
19 agreed to the submission -- I believe it's on the
20 record -- that they said no objection to that
21 summary document.

22 We can certainly proffer the documents, which
23 they've seen many, many times. They've had them
24 for a long time, so there is no dispute about that.

25 In terms of reasonableness and necessary,

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3913

1 there were multiple who testified about Marilyn
2 Seskin's treatment. For example, her own doctor
3 talked about the surgery, and I think thing their
4 lawyer asked about that, but he definitely
5 testified this is what he needed to do.

6 Dr. Chan went through her whole course of

7 treatment. He had a little timeline and he said
8 this is what she went through, you know. And then
9 they would cross -- we crossed their doctors, they
10 crossed our doctors. Multiple doctors said, "I
11 don't have any problem with this."

12 The gynecologic oncologist, Dr. Saenz, you
13 know, "Do you have any problem with her medical
14 treatment?"

15 "She got the best medical treatment."
16 Everything was good.

17 THE COURT: And nothing that her doctor did or
18 that she did in any way was at fault or I can't
19 point to anything they did that was not --

20 MR. OLIVER: The record is replete with
21 evidence that supports the reasonableness and
22 necessity of the medical procedures.

23 MR. LEPPERT: Twofold. No objection to the
24 introduction of the summary, but a summary was
25 admitted without objection in the Bilomento case.

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3914

1 You still have to have the underlying records.

2 But even if we put that to the wayside for a

3 moment, there was no testimony that the amount, the
4 733 is a reasonable amount in that the treatment
5 was necessary and reasonable. In other words, they
6 have to tether that to the amount of the treatment
7 and we didn't have any testimony on that. That's
8 the point.

9 THE COURT: I know, but what counsel is saying
10 is that if you don't challenge the actual treatment
11 that Ms. Seskin received, then how can you then
12 come in and take fault with the amount that the
13 treatment costs?

14 MR. LEPPERT: The issue is it's the
15 plaintiff's burden. We don't have the requirement
16 to challenge it. We don't have the requirement to
17 challenge it. It's their burden to come forward
18 that it is reasonable and that it was necessary,
19 the amounts charged were reasonable and necessary,
20 and we don't have that.

21 THE COURT: Your motion for directed verdict
22 is denied.

23 How much time did you-all agree to for closing
24 arguments?

25 MR. OLIVER: Last night, we agreed to one hour

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3915

1 and ten minutes per side.

2 THE COURT: That's going to take us to about
3 5:00, then the jury will be charged, that's another
4 20 minutes, that would take us until around
5 5:20 p.m.

6 MR. RAYFIELD: Your Honor, how many copies of
7 the instructions would you like? For every juror?

8 THE COURT: That would be great if you did
9 that. I normally don't do that, but I appreciate
10 that, if you did that. So that would be seven.

11 Plaintiff, how much time do you want to
12 reserve for your closing?

13 MR. OLIVER: Twenty minutes for rebuttal.

14 THE COURT: The jury is coming in.

15 (The jury enters the courtroom.)

16 THE COURT: You-all can be seated, be
17 comfortable.

18 For the record, all of our jurors are present,
19 all the parties are present.

20 Ladies and gentlemen, you have heard all the
21 evidence and testimony you are going to hear in
22 this case. Both sides have rested their case.
23 They have indicated there is no more evidence they

24 wish to present.

25 At this time, you are going to hear closing

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3916

1 arguments from the lawyers. Now, I need to remind
2 you that what the lawyers say is not evidence.
3 Evidence is what you've already heard from the
4 witnesses from the witness stand, exhibits that
5 were admitted into evidence, or any facts that I
6 may have told you you must accept as true, but
7 lawyers speaking is not evidence. But I ask that
8 you pay very close attention to the arguments of
9 the lawyers because it can guide you in your
10 deliberations in the jury room.

11 The plaintiff and the defendant will have an
12 equal amount of time to speak to you. You'll hear
13 from the plaintiff, then you'll hear from the
14 defense, and if the plaintiff has any time
15 remaining, you'll hear from the plaintiff again.
16 If they don't have any time remaining, you won't
17 hear from them again. I will then give you the law
18 and you will go into the jury room and deliberate
19 until you have a verdict.

20 Would you like to give a closing argument?

21 MR. OLIVER: I would. Thank you, Your Honor.

22 Good afternoon, ladies and gentlemen of the
23 jury. The first thing I'm going to do is thank
24 you. I know this has been a long road and we
25 appreciate your attentiveness, and we appreciate

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3917

1 all the great questions you've given us, and we
2 understand and are grateful for the time we've
3 taken away from your families.

4 This is our job, but we know it's not your job
5 and we want to thank you, and we are sincere about
6 that. Our country doesn't work the right way
7 unless we do this type of service, so thank you.

8 This is obviously my closing argument. It's
9 my opportunity to summarize the evidence and walk
10 through what we think that evidence shows and what
11 we have proved. Now, I think you'll remember that
12 at the beginning of the case in opening, I said I
13 want to leave you with three questions. I'm going
14 to let those three questions guide us through the
15 evidence.

16 Who is telling the truth? What does common
17 sense tell you? And what is the right thing to do?

18 Before I go through those things, I want to
19 talk a little bit about the burden of proof. You
20 probably all remember doing voir dire, Judge Thomas
21 called this the feather burden.

22 The reason that it is that way is because,
23 unlike a criminal case, the scales of justice start
24 equally, but all we have to do is show by some
25 small amount greater than 50 percent that we have

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3918

1 proved our claims. If we do, then the verdict must
2 be for my client. That's why it's called the
3 feather burden because if a feather is on this side
4 in my favor and there is nothing else on that side,
5 we win.

6 What does that mean in this case? It means
7 50 percent. You see that, but as to causation,
8 plaintiffs need only prove that Johnson's Baby
9 Powder was a substantial contributing cause, a
10 legal cause -- you are going to see that on your
11 verdict form -- of Marilyn's primary peritoneal

12 cancer.

13 Plaintiffs do not have the burden of proving
14 that Johnson's Baby Powder was the only cause of
15 primary peritoneal cancer. The only claim in this
16 entire thing that doesn't have that burden is
17 punitive damages. I'll talk about that later.
18 That has to be by clear and convincing evidence,
19 and I submit to you today, ladies and gentlemen of
20 the jury, that we've met the burden for both our
21 substantive claims and our punitive damages claims.

22 So who is telling the truth? Well, we began
23 this by showing you the messages that Johnson &
24 Johnson put out to people in the world about their
25 product. And we began long before Marilyn was born

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3919

1 because we wanted you to understand that their
2 messages were consistent from the beginning to the
3 end.

4 I even showed you an ad they had run at one
5 point in the 1920s and reran it in 1990 or '95 as a
6 celebration of this message of purity and safety.
7 And they used that, as you can see on the slide and

8 we talked about that, in 1966, they began marketing
9 directly to adult women and teenage women. And you
10 saw examples of these ads; this is the kind of
11 thing they put out to convince young women to use
12 their product. And it worked.

13 You saw their own documents that said
14 92 percent of all teen girls would see this,
15 50 percent would be exposed to five or more of
16 these types of ads. This is 1972, so Marilyn
17 Seskin is about 23 years old. Remember they
18 started this type of thing in 1966.

19 The point is that Marilyn Seskin was of the
20 age at the right time that she would have received
21 these messages and her conduct tells us that she
22 did. She said she saw Johnson & Johnson
23 advertisements on her sworn statement and her
24 conduct tells us that she acted in accordance with
25 this.

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3920

1 So this entire case, for some part of it, has
2 been about what Johnson & Johnson did not share
3 with Marilyn and what Johnson & Johnson did not

4 share with all of its other female consumers. This
5 timeline is a good way to look at this. It shows
6 some of the watershed moments in this course of
7 conduct for Johnson & Johnson about what they knew
8 and what they didn't share.

9 At the beginning, you remember early, in
10 1953 -- we've heard a lot of discussion from the
11 experts about inflammation. Well, in 1953, Johnson
12 & Johnson filed a patent for a cornstarch-based
13 product that did not cause inflammation like talc
14 did in the peritoneal. That's where Marilyn got
15 her cancer.

16 It filed that patent in 1953. It didn't
17 introduce the cornstarch product until much, much
18 later. And you heard their own experts argue about
19 the concept that inflammation cannot be harmful and
20 cannot cause cancer. That's just ridiculous in
21 light of their documents.

22 In the 1950s, you also saw a series of mining
23 reports with Dr. Lara Freidenfelds. This is from
24 the Battelle labs. There was a series of them.
25 Those mining reports used the word "tremolite."

1 And there was some argument from Dr. Sanchez,
2 I like to call him Dr. HVAC. I think you'll
3 remember him. He wanted to argue about the
4 definition, but these documents say fibrous talc is
5 in that product in those mines, and when they said
6 tremolite, I showed you the pages that used the
7 words "needle-like" and "acicular" and those words
8 mean that it's the bad type of tremolite.

9 If it just said tremolite not acicular, or not
10 needle-like, fine, but that's not what it said.
11 They were worried about this and they were tracking
12 it because they knew it was harmful.

13 Marilyn Seskin was nine years old. In 1958,
14 if Johnson & Johnson had told all the moms out
15 there that there might be asbestos in our product
16 because it's in our mines, none of this would have
17 happened.

18 1964, this is a document where Johnson &
19 Johnson admits that talc cannot be safely absorbed
20 in the vagina. They said that in 1964. Marilyn is
21 15 years old. They brought experts into this
22 room -- Dr. Felix was one of them -- who didn't
23 believe that talc could get into the vagina. I
24 can't believe it. They knew that in 1964.

25 1971, you'll remember this. Johnson & Johnson

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3922

1 was following the research over the pond in London.
2 They had found talc particles in women's tissue,
3 and Mount Sinai School of Medicine confirmed the
4 talc and also confirmed asbestos.

5 Now, Johnson & Johnson has made a big deal
6 about who withdrew what results, and I can't keep
7 up with it, but these results were never withdrawn,
8 okay? They found chrysotile asbestos and they
9 found talc. Marilyn Seskin was 22 years old. This
10 was another opportunity that this company had to
11 tell the truth and do the right thing and they
12 didn't.

13 This document -- or these two documents are so
14 important because on the left, you have them
15 admitting it's normal to find tremolite asbestos in
16 their mines, and then you have them on the right
17 saying our baby powder contains talc fragments that
18 can be classifiable as asbestos. They admitted in
19 their documents that their own personal notes,
20 high-level executives, it's "a talc-ovary problem"

21 in 1975. They've come into the courtroom and said
22 it's no big deal, but their executives at the time
23 said it was a problem.

24 Marilyn was 26 years old. They could have
25 made the right decision there and told the truth.

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3923

1 They didn't.

2 In 1982, you heard the story of Dr. Cramer.
3 He found a statistically significant association,
4 and you heard evidence in this courtroom, that was
5 the first one. And at that point, under FDA
6 regulations -- we'll look at that in a minute
7 Johnson & Johnson had a statutory duty to warn and
8 they didn't.

9 But what happened after that study? Well,
10 first of all, they intimidated Dr. Cramer. Imagine
11 an executive of Johnson & Johnson going to visit a
12 grad student. That's crazy. That doesn't happen.

13 But after this, up until today, there are 40
14 studies that are case-control studies showing this
15 association. And 38 out of 40 show it, right? And
16 you saw that chart with Dr. Ness. We'll look at

17 that.

18 We showed you evidence that in the '90s, their
19 own consultants told Johnson & Johnson -- remember
20 it was working with this group called the Cosmetic,
21 Toiletries and Fragrances Association? And we have
22 a conspiracy claim in this case and that is the
23 conspiracy. We allege that from the 1970s -- and
24 we've introduced these documents -- Johnson &
25 Johnson got together with its best corporate

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3924

1 buddies who were part of the Cosmetic, Toiletries
2 and Fragrances Association and they basically
3 started a campaign to start doubt science. They
4 intimidated the scientists. They made false
5 statements. And you heard about the National
6 Toxicology Program.

7 But this is so important because Johnson &
8 Johnson consultant writes to them and said you keep
9 saying there is no association and that's not true.
10 And if you keep doing this, you are going to be
11 viewed like the cigarette companies because
12 everybody associates the CTFA with Johnson &

13 Johnson.

14 Marilyn Seskin was 48 years old. I don't know
15 if 48 years old was enough to stop it, right? By
16 that point, it may have been too late for her, but
17 they had an opportunity in 1997 and they didn't do
18 it. Their own consultant said it was false.

19 Dr. Freidenfelds told us that Johnson &
20 Johnson and the CTFA, the Talc Interested Party
21 Task Force was a subgroup of the CTFA. Did
22 everything they could to make sure that talc did
23 not get listed as a carcinogen by the National
24 Toxicology Program. Not only did they refuse to
25 share the knowledge they had, but they made sure

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3925

1 that nobody else shared that knowledge with women
2 either.

3 J&J's defense strategy paid off. This is a
4 series of documents that summarize their
5 interaction with the NTP regulatory committee. And
6 if you'll remember, defense counsel did something;
7 she brought an email where this guy, Steve Jarvis,
8 he's from Luzenac, he's one of the coconspirators

9 with Johnson & Johnson. He said, hey, you guys can
10 send me a bill, I'm 100 percent responsible for
11 this.

12 And they tried to get you to believe that he
13 wasn't being sarcastic. And I was shocked because
14 ten minutes later, I got this document that said,
15 well, you didn't get the full story. This is what
16 Johnson & Johnson's executive said. He said: We
17 did it. We worked together and we stopped the
18 National Toxicology Program from listing talc as a
19 carcinogen. It wasn't enough for them to keep
20 their own internal knowledge secret, they had to go
21 out and make sure nobody else did it.

22 So what does common sense tell you? Well,
23 you've heard a lot of information about the FDA,
24 and you heard a lot of information about how
25 Johnson & Johnson wrapped itself up with the FDA.

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3926

1 I think that's sort of ironic because in 2019, the
2 FDA finds asbestos, Johnson & Johnson then finds
3 asbestos, Johnson & Johnson then does the
4 air-conditioner story, then they take the product

5 off the market. So that's the last word from FDA.
6 Everything they want to talk about happened before
7 that.

8 But it's important to remember that the U.S.
9 Food and Drug Administration doesn't regulate
10 talcum powder or cosmetics like they do
11 pharmaceuticals. They simply don't have that
12 power.

13 Johnson & Johnson's 30(b)(6), their corporate
14 representative, even testified to that. I said,
15 "You didn't want to do it." It was me deposing
16 him. "You didn't want to do a recall."

17 She said, "We did not."

18 What happened? The FDA said, "We are
19 releasing these results in 24 hours. You've got 24
20 hours to figure it out."

21 And then they did a recall. So it's J&J's
22 responsibility under the regulations to label their
23 product and they never did that.

24 Dr. Plunkett is a toxicologist and regulatory
25 expert and she told us just that; the regulation --

1 and it's undisputed, they don't disagree -- says
2 that they must put a warning whenever necessary or
3 appropriate to prevent a health hazard that may be
4 associated with the product. They don't have to
5 believe it, they don't have to endorse it, but if
6 they come to a conclusion that a health hazard may
7 be associated with a product, then they have the
8 legal obligation to do that. They never did it.

9 They fought it all along, and their experts
10 took the oath in this courtroom, and their
11 corporate representative, Dr. Kuffner, said, "We
12 didn't have an obligation to do that."

13 So why did the regulatory agencies not get on
14 them soon enough? Well, the regulatory agencies
15 didn't get on them soon enough because Johnson &
16 Johnson -- remember there was a slide where defense
17 counsel suggested somehow that we were saying the
18 regulators conspired with them?

19 And I didn't understand. I was like, "No, no,
20 you lied to them too."

21 And this is a great example. In 2016, 40
22 years after this first asbestos documents -- my
23 math is terrible -- 50 years after that, they are
24 still telling FDA no asbestos foreign structures
25 have ever been found during any testing. And you

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3928

1 know not true because we showed you. Every time
2 they would get a test that said there is some
3 asbestos, then all of a sudden the lab would test
4 it again and say, oh, there is no asbestos, so you
5 got a clean result.

6 Something else was interesting. Dr. Sanchez
7 told us why that is. He said when there is
8 asbestos in a product, he said if you test it one
9 time and you find it, you can test the same lot the
10 next time and you may not find it because asbestos
11 is microscopic and it's hard to find. And we are
12 going to talk more about that.

13 But in 2020, Health Canada got the whole
14 record. They got everything you-all have had and
15 more. And Johnson & Johnson was the one who sent
16 it to them, by the way. We did not make all those
17 expert reports available to Health Canada. They
18 did.

19 MS. BROWN: Objection, Your Honor. That's not
20 in evidence.

21 THE COURT: Rely upon your own independent and

22 collective recollection as to what the testimony
23 was.

24 MR. OLIVER: They gave that information to
25 Health Canada. And you remember Dr. Kuffner up

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3929

1 here talking about he gave it his best shot. He
2 was the person with ultimate responsibility for the
3 safety of the product. Did everything he could
4 starting in 2018 or 2017, whenever he took over, to
5 get them to change their mind. And they didn't do
6 it.

7 Health Canada looked at it neutrally. And
8 remember, I asked him, "Are they a neutral party?"
9 And he said yes, but then he wouldn't admit that
10 Johnson & Johnson is not neutral. And we know they
11 are biased in favor of their product, we know that.

12 So what is this? It's the pictures FDA took
13 of the chrysotile asbestos they found in Johnson's
14 Baby Powder. It's undisputed that that is
15 chrysotile asbestos, nobody has said it's not.

16 Dr. Sanchez did not come in here and say that
17 that's not asbestos. He said that must be

18 contamination. Well, how do you repeat it? I need
19 proof of it. He just said it must be contamination
20 because I've done all these tests and they just
21 can't be right. That's his whole story on that.

22 And what do we know about asbestos? Well, we
23 know that all regulators agree -- the FDA, NIOSH,
24 and even Johnson & Johnson -- there is no safe
25 level of asbestos. Interestingly, Dr. Boyd, he did

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3930

1 not agree with that, and he also thought that you
2 could take a vacation to Chernobyl and that
3 radiation does not cause cancer. That was his
4 testimony. I almost fell out of my chair on that
5 one.

6 We also brought you Dr. Mark Rigler. So in
7 the context of this litigation Dr. Rigler got
8 bottles of Johnson's Baby Powder that Dr. Sanchez
9 also tested. Obviously, he disagrees. He got this
10 and he did heavy liquid separation. And Dr. Rigler
11 explained that using heavy liquid separation won't
12 allow you as easily to find chrysotile because
13 chrysotile doesn't weigh enough, but he explained

14 that using heavy liquid separation allows you a
15 better result to see actinolite, anthophyllite, and
16 tremolite.

17 And he found in Johnson's Baby Powder bottles
18 71 percent of the time, he found asbestos. In
19 Shower to Shower bottles, 77 percent of the time.
20 That's only important because they used the same
21 mine source. So what is in Shower to Shower is in
22 Johnson's Baby Powder, it's just a little bit
23 fragrance or something. And the Imerys railcars,
24 the company where they got their talc, they had a
25 53 percent positivity rate of asbestos.

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3931

1 And so what does common sense tell you about
2 this? It tells you that Johnson's Baby Powder can
3 be contaminated with asbestos because their mines
4 were contaminated with asbestos, and they knew that
5 all along. And the most logical source of that is
6 from their mines, it gets in their bottles
7 sometimes, right? It's just common sense.

8 What do they want you to believe? Well, we
9 heard something about Marilyn scuba diving, so

10 maybe -- I mean, I don't know what that was about.
11 We heard some testimony about asbestos fibers being
12 all around the air, right? We heard that in
13 opening.

14 Then Dr. Sanchez got up, and even though
15 asbestos fibers are supposed to be all around in
16 the air, he said, I find amphiboles all the time,
17 but it's really rare to find asbestos. I was
18 sitting there scratching my head saying, "Okay,
19 which is it? Is asbestos everywhere or do you
20 actually find it?"

21 And we know the answer. Dr. Rigler also found
22 98 percent fibrous talc. Why is that important?
23 I'm going to show you a slide in a minute, and
24 these are pictures he found, asbestos fiber and
25 fibrous talc fibers.

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3932

1 By the way, when I was talking about who was
2 looking for it and how they looked for it,
3 Dr. Rigler used a 100-grid square area so he could
4 get a better view of what he was looking at in a
5 wider area, and that allows him to see more

6 asbestos. I am not telling you today the whole
7 product was asbestos. You do have to look for it.
8 But RJ Lee and J&J -- RJ Lee uses a 35-grid square
9 area, Dr. Sanchez was not using heavy liquid
10 separation, and J&J, when it was doing its testing
11 only used 10-grid square area because it reduces
12 their ability to find asbestos.

13 So what did Dr. Sanchez tell us? Dr. Sanchez
14 is a geologist. He works on rocks, not people. He
15 argued about definitions, but he was very clear:
16 He doesn't know how any of this affects the health
17 of human beings. He is not that doctor. He really
18 spending his time in courtrooms, not laboratories.
19 He's testified over the last -- I don't remember
20 the time period -- 144 times for Johnson & Johnson.
21 That's his full-time job. He is not in
22 Pennsylvania working at the lab. He can live in
23 Utah because he goes around the country testifying
24 for them. That's all he does.

25 He talked about the difference between

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3933

1 asbestos fibers around cleavage fragments.

2 Cleavage fragments are dangerous too, and
3 Dr. Sanchez didn't say they weren't because he
4 can't give that kind of testimony.

5 But more importantly, Dr. Rigler didn't count
6 cleavage fragments, he testified to that. They
7 aren't what he counted, so it doesn't matter what
8 Dr. Sanchez said about those. They are dangerous.
9 Regulators agree they are dangerous, but it's
10 relevant. We didn't count those.

11 And, of course, the greater story ever told:
12 Air-conditioners, not asbestos. That was my
13 favorite. I love this story. This air-conditioner
14 must be a magic air-conditioner. Remember, there
15 were 18 blanks in here, and those are 18
16 opportunities to detect contamination in a
17 laboratory environment. Everybody agrees.

18 Everybody agreed that when Johnson & Johnson
19 did that first test of the same lot of baby
20 powder -- not the same bottle, it came from a
21 different place -- they found chrysotile asbestos.
22 And they claimed it was this air-conditioner, and
23 somehow, it got into the thing, it didn't get into
24 the blanks, it wasn't on the hood, and I guess I
25 would say ironically, when he was asked about the

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3934

1 person he talked to, Dr. Sanchez could not remember
2 her name. And I would submit to you he could not
3 remember her name because that conversation never
4 happened.

5 Why are they here? Dr. Freidenfelds told us
6 that J&J abused the public's trust. There are a
7 lot of companies in this country that make
8 dangerous products, and if they have if appropriate
9 warning and you want to take a risk on a dangerous
10 product, that's okay, but what makes Johnson &
11 Johnson's conduct so insidious is their own
12 definition of trust that they built up over the
13 years. They told us it was safe enough for your
14 baby, you could put it anywhere you wanted, and
15 they understood that trust meant that products will
16 work without unexpected adverse physical or
17 emotional effects, and they broke that trust over
18 and over again.

19 We've talked a little bit about Dr. Kuffner.
20 He did not test any of those recall bottles. If I
21 wanted to prove that my product was safe and I was
22 biased in favor of patient safety, which is what he

23 said -- I didn't believe him, but that's what he
24 said -- I would have tested. I don't know how many
25 of the bottles I would have tested, probably a lot

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3935

1 of them. I would want to come back and say, look,
2 it was a mistake, it was a mistake. But they
3 didn't do any of that.

4 And he said, "If it was dangerous, I would
5 have taken it off the market." And then you
6 learned they did take it off the market, but they
7 blamed it on COVID. They want you to believe that
8 they discontinued their 126 year-old golden egg due
9 to COVID-related business decisions.

10 And by the way, they still sell
11 cornstarch-based Johnson's Baby Powder. So none of
12 that makes any sense at all.

13 And of course, you saw our house of cards at
14 the beginning. This is all over the place. It is
15 inconsistent. Some of their experts say asbestos
16 causes cancer. Dr. Felix agrees, but Dr. Boyd says
17 even radiation doesn't cause cancer. That's why
18 this entire thing is a house of cards. They keep

19 making inconsistent statements over and over again.

20 It is not consistent and it's not the truth.

21 So we know what this all looks like. They
22 engaged in all of this conduct. They hid the fact
23 that there was asbestos in their product and their
24 product causes cancer. They engaged in a campaign
25 of doubt science. The FDA finally caught on to

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3936

1 them. They found the asbestos. They had a forced
2 recall.

3 They claimed it was contamination. They took
4 the product off the market. And then they came
5 into the courtroom and every time they got a
6 chance, they wanted to blame plaintiff's lawyers.
7 They lied for 50 years, and they wanted to blame me
8 because I got a couple articles from an expert when
9 he was trying to tell me about asbestos. That is
10 absolutely ridiculous.

11 So how did we get from my client, Bob
12 Sugarman, and his wife, Marilyn, happy and healthy
13 to there, Marilyn wasting away? Well, it was
14 undisputed that Marilyn used the exact exactly the

15 way we said it. Even Dr. Felix admitted on the
16 stand the defense lawyers told him to assume that
17 was true. You don't need to spend a minute
18 thinking about it. She did it and it's undisputed.

19 What did you hear about migration? Well, this
20 is how it works, but you heard that even the FDA
21 back in, I guess it was 2014, I'm sure the defense
22 lawyer will tell you, they said it's undisputed
23 that talc migrates up the vagina and into the
24 ovaries. And all of our doctors said that is
25 absolutely what happens.

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3937

1 Now, I have this slide up here again because I
2 wanted to point out a couple things. First of all,
3 the case is not only about asbestos. Platy talc is
4 inflammatory and a possible carcinogen as
5 designated by IARC. Fibrous talc is a Group 1
6 known carcinogen, and even Dr. Sanchez agreed that
7 there was fibrous talc particles in Johnson's Baby
8 Powder, he just wouldn't agree with what that
9 definition meant. All of these constituents cause
10 inflammation that leads to gene mutations.

11 So there was a lot of discussion about
12 genetics. We didn't get into it as deeply as maybe
13 we wanted to because of time, but at the end of the
14 day, genetics plays a role in everything in
15 everybody's body, but you don't just get a mutation
16 unless you have BRCA, which by the way, you heard
17 consistent evidence, our client did not have those.
18 Those do cause ovarian cancer; she didn't have
19 them.

20 But the way these genetics work in causing
21 cancer is there needs to be something that triggers
22 that genetic mutation. For somebody who is a
23 long-time smoker, it could be smoking. For
24 somebody who is exposed to high doses of radiation,
25 despite what Dr. Boyd says, it is absolutely

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3938

1 undisputed that it happens.

2 And it's the same process with talc; that
3 constant inflammation over many, many years leads
4 to an inflammatory process that ultimately leads to
5 someone like Marilyn getting cancer, with
6 certainty. I don't have to prove my claim with

7 certainty, but I have. Our pathologist was asked
8 about the particles. He showed them to you. He
9 said that in more than half her slides, she had the
10 particles. He was 90 percent certain the particles
11 were talc.

12 Dr. Felix really couldn't tell you what they
13 are. He said it could be talc, and he had some
14 very confusing testimony about foreign body
15 reactions, but what I was trying to do through my
16 questioning -- and I'm not sure if I got there --
17 he wanted to talk about inflammation. When you go
18 into a tumor process, the doctors testified -- our
19 doctors testified that of course there is
20 inflammation. That process is an inflammatory
21 process.

22 But the inflammation that started the cancer
23 many years ago, you can't view that in many
24 situations. Certainly not in this situation.
25 Dr. Felix wanted to talk about ulcerative colitis,

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3939

1 and I don't know what he's talking about, but
2 that's not what happened here. We are not dealing

3 with ulcerative colitis.

4 Dr. Rigler had no doubt in his findings, and
5 Dr. Ness explained that talc is a cause, and
6 Dr. Chan explained he was very certain that
7 Marilyn's genital use did cause her cancer. She
8 went through the accepted tenets of causality.

9 By the way, I don't remember if any of the
10 defense lawyers went through this, but she went
11 through each one. The only one she didn't find was
12 experimental data because you can't do that. Once
13 you believe that this causes cancer, you cannot
14 give it to people and say, "Let's do this."

15 What was so great about Dr. Ness? I promised
16 you in opening we would bring you someone who had
17 done the research, and she was one of the doctors
18 who had done the research. She was the only one
19 who came into the room. Remember what she said;
20 she said, "I didn't believe it."

21 It was the '90s. She said, "I didn't think
22 there was asbestos in talc and I didn't think there
23 was this connection and I did the work and I found
24 out that there is a connection and now I believe it
25 and now I understand that Johnson & Johnson was not

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3940

1 telling us that there was asbestos in its talc."

2 She showed us the consistency of the studies.

3 I thought somebody asked a brilliant question, "Are
4 you saying that all the of plaintiff's studies are
5 wrong?" Dr. Osann said that's exactly what I'm
6 saying. They're all wrong. Everything we believe
7 must be wrong. Despite the fact that those studies
8 are out there, they are accepted, they are
9 peer-reviewed, they are absolutely reliable.

10 There is a lot of discussion about
11 dose-response relationships. These are just some
12 of the studies that show that the higher up you go,
13 the higher the risk goes. And what's important
14 about this is greater than 10,000 applications from
15 99 and 92. Marilyn Seskin had nearly 40,000
16 applications if she applied it only twice a day,
17 which was a conservative estimate.

18 If somebody came in and said, "I used talc on
19 my genitals for two years" or something, well, that
20 may not be the case, you know. That may not be
21 what's happening. But this woman put it on herself
22 at least 37,000 times.

23 How important is this? Well, Dr. Ness

24 explained that nearly 6,000 women a year are going
25 to be diagnosed with ovarian cancer that is related

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3941

1 to talcum powder. It's 29 percent, according to
2 her calculations, of the ovarian cancers that are
3 out there.

4 Why is that important? It's important because
5 when you consider our punitive damages claim, you
6 are allowed to consider -- you are not allowed to
7 punish them in this courtroom for something they've
8 done to someone other than Marilyn, but you are
9 allowed to consider that in determining the
10 reprehensibility of their conduct.

11 Dr. Ness has done the work. When we compare
12 Dr. Osann with Dr. Ness, there is no contest. She
13 knows what she is doing. She's done the work.
14 Dr. Osann has not. She is an epidemiologist and
15 she's more on the statistical side of things. It's
16 just not her area of expertise.

17 This is all the organizations that agree that
18 asbestos causes ovarian cancer, but Dr. Saenz and
19 Dr. Osann came in and told you that they don't.

20 What was very fascinating about Dr. Saenz is she
21 actually told you that if you walked into her
22 office and said, "I am going to powder myself with
23 an asbestos-contaminated powder," she would say
24 there is no danger from that, and that is
25 absolutely unbelievable.

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3942

1 Who is telling the truth and what does common
2 sense tell you? Common sense tells you she is not
3 telling the truth and that she came into this
4 courtroom and she told you something because it's
5 good for her client, and that's it.

6 So when you put it all together, what you get
7 is a pretty clear picture that Johnson's Baby
8 Powder causes ovarian cancer. And it did here.

9 You heard from Dr. Morrissey by deposition.
10 The reason his testimony was so important is
11 because the defendants have made something about
12 the idea that this was not an ovarian cancer, that
13 it was primary peritoneal. Dr. Morrissey said
14 unequivocally, "I am the guy who took it out."

15 The defense lawyer tried to get him something

16 about this, he said no. These type of cancers all
17 come from the same place. It's high-grade serous.
18 He agreed that it was the one associated with the
19 literature, and he said it could be the fallopian
20 tubes, it could be the ovaries, it could be the
21 peritoneum, I just did the best I could.

22 And Dr. Chan showed us that field of cancer,
23 which was a little bit disturbing, but when you saw
24 that, the reason we wanted you to see it is because
25 then you understood: You can't say where this

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3943

1 started. But it doesn't really matter anyway
2 because she had the right cell type.

3 And Dr. Juan Felix told us today that
4 high-grade serous carcinoma, he said that that is
5 extremely important, which cell type it was. And
6 we agree. So Dr. Sitelman found talc in over half
7 of Marilyn's tissues. Obviously Dr. Felix didn't
8 agree, but 99 percent of his experience is
9 completely irrelevant because he wasn't looking for
10 any of this under the right microscope, 1 percent
11 of the experience was also irrelevant, but he

12 wouldn't admit it. He was talking about
13 pleurodesis, which is a procedure in the lung where
14 they intentionally inject large amounts of talc
15 into your lung.

16 Now, if you are wondering about why it
17 wouldn't cause cancer in that situation, I'll give
18 you an example. Everybody has had a smoker in
19 their life. My grandfather died of COPD. My
20 grandfather died of COPD, he could have gotten a
21 lung disease. He didn't get cancer in his fingers,
22 but the nicotine and all the carcinogens were
23 touching his fingers.

24 Carcinogens affect different parts of your
25 body in different ways. The outside of your skin

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3944

1 is different from the inside of your skin, and the
2 inside of your lungs is different from the inside
3 of your ovaries, and that's the problem here. When
4 these inflammatory agents get into the peritoneum
5 and the ovaries, that's when you get the reaction.
6 If the outside of your skin -- they asked a lot
7 about that -- that's not what this is about.

8 So the contributing causes of Marilyn's
9 primary peritoneal cancer. This is a chart that
10 Dr. Chan went through with you and we added
11 nulliparity. Dr. Chan didn't talk about that, but
12 Dr. Ness did. So did she have an early menarche?
13 No. Did she have a late menopause? No. She did
14 not have a genetic risk from BRCA 1 or 2.

15 Dr. Chan talked about endometriosis. I want
16 to be very clear about something. Dr. Ness said
17 endometriosis can be a risk factor for cancer, but
18 it is primarily a risk factor for clear cell
19 cancer, which is something that Marilyn did not
20 have. She didn't have clear cell cancer.

21 So there's been a lot of talk about
22 endometriosis. Dr. Chan did not see a confirmed
23 pathology and did not believe she had that, but it
24 doesn't matter anyway because it's the wrong type
25 of cancer.

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3945

1 She didn't have pelvic inflammatory disease.
2 She did not have children, which obviously she
3 can't help. She doesn't make that choice. You

4 don't make that choice based on whether you think
5 it's going to decrease your risk of something. She
6 is of a certain age; nobody can help their age.
7 And the only other risk factor she had was the
8 genital use of J&J talcum powder daily for 50
9 years. We talked about that.

10 Dr. Chan was certain it was a substantial
11 cause of her cancer. "How sure are you of that,
12 Doctor?" "I'm certain."

13 So I want to talk about causation.
14 Substantial contributing cause under the law can be
15 slightly confusing. I have to explain it on a
16 regular basis to nonlawyers and juries. As I was
17 thinking about this, I thought this was a perfect
18 analogy, and here is why. So there are three
19 factors here that we say had a risk for ovarian
20 cancer: Her age, the fact that she didn't have
21 children, and J&J talcum powder. And I thought of
22 the fire that happened in Hawaii.

23 And something I learned about the fire that
24 happened in Hawaii is one of the main causes of
25 disastrous fires is high wind. We all know that

1 dry conditions cause it, but I really didn't know
2 that high winds were a big problem, and I learned
3 that the reason it was so bad was because of high
4 winds. Well, you can't help having a dry
5 environment. Sometimes it doesn't rain. And you
6 can't help the fact that there are high winds. We
7 don't have control over that.

8 The risk factors of age and not having
9 children are very much like that. Your age is what
10 your age is. But in order to have a forest fire,
11 you need something that starts the fire. You need
12 somebody flicking a cigarette on the ground, you
13 need somebody starting a fire at a campsite that
14 they are not supposed to. But you can have a dry
15 environment and it can be windy, and most of the
16 time, nothing happens, right?

17 It only happens when somebody or something
18 does something to start that process. And that is
19 exactly what the evidence in this case shows
20 happened with Marilyn Seskin. Of course, she was
21 in her 60s; she has the risk that's related to
22 that.

23 She didn't have children; she has the risk
24 that's related to that. But what actually caused

25 her to get it was that spark of Johnson's Baby

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3947

1 Powder that she had used over her whole life, and
2 that's what pushed her over the edge to cancer.

3 You heard about her journey and how that was
4 on Bob. And I want to make something clear: The
5 verdict form will say this to you, but the damages
6 are not for what she went through, but for what Bob
7 went through. The law says that when you die, your
8 claims die with you, but my client's claims remain.
9 What he went through for three years, holding her
10 hand, going to her doctors' appointments, watching
11 her waste away, that is his damages in this case.

12 And I don't think anybody disbelieves what Bob
13 told us. It was an extremely moving story and it
14 was an extremely painful part of his life.

15 He also testified about his wife's medical
16 bills. We've submitted Plaintiff's 6106, which is
17 a summary of those bills. There is documentation
18 to back that up. It is not in evidence, but he
19 testified about it, and this document is in
20 evidence. That's undisputed.

21 So what's the right thing to do? Compensatory
22 damages. People often have trouble with the
23 concept of damages because in a perfect world, we
24 could bring back someone's loved one and raise them
25 from the dead and give them back. We can't do

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3948

1 that.

2 I like to relate it this way: When I was a
3 small child, there was a jewelry store in my
4 hometown. It was a very small town. It's not like
5 the jewelry stores here. It was a modest place,
6 but I didn't have -- when I was ten, I didn't have
7 any money to buy anything. They had a sign on the
8 wall that said, "You break it, you buy it."

9 And nobody ever questioned that. I didn't go
10 in there with my mom and she didn't say, "Oh, it's
11 okay if you break something." I knew that if I was
12 horsing around in the jewelry store and I knocked
13 over stuff, I had to pay for it.

14 That's the principle of compensatory damages
15 under the law. You break it, you buy it. If you
16 do something that harms somebody, you have to pay

17 for it. You have to compensate them for that. It
18 could be a financial loss in the stock market, but
19 when it's a personal injury case, it could be their
20 medical bills. When somebody dies you also have to
21 pay for it, and you can't bring that person back.

22 You guys, this is up to you. There is no
23 formula. The way I relate it was this: Dr. Saenz
24 charged \$750 an hour for her work in this case when
25 she wasn't in court.

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3949

1 MS. BROWN: Your Honor, I object to the
2 improper comparison to expert compensation.

3 THE COURT: Overruled.

4 MR. OLIVER: Dr. Osann charged \$350 an hour
5 for her regular review. Why do these experts get
6 paid so much? Well, as you saw, sometimes when the
7 expert takes the stand, it's a stressful job, so it
8 takes a lot of work. So Johnson & Johnson believes
9 that's an appropriate way to pay their experts, and
10 so do we, because it's a tough job.

11 But the job that Johnson & Johnson gave Bob
12 Sugarman was to stand by his wife and watch her

13 waste away. And you heard at the end of her life,
14 she actually starved to death. She stopped eating.
15 She didn't want to go to hospice because she knew
16 what that meant. She was a doctor. And Bob had to
17 watch that happen.

18 And then she gave him a birthday gift, a gift
19 to go to a baseball game with his son. She said,
20 "Bob, we've done this. We've said our good-byes.
21 It's okay, go to the baseball game." He went to
22 the baseball game with his son and she died when he
23 wasn't there.

24 So that's the job they gave him. For those
25 days dealing with that, I would charge them \$750 an

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3950

1 hour for ten hours a day. After Marilyn's death, I
2 can't tell you, but it's probably better at some
3 point when you've gone through three years of
4 suffering, it's probably a little better when you
5 know your loved one is no longer suffering.

6 So I would use \$350 an hour at ten hours a
7 day. And that's a lot of money. It's \$14 million.
8 And the reason for that is because we can't bring

9 Marilyn back, but we have to make them compensate
10 Bob for what he went through.

11 So the final claim we have is our punitive
12 damages claim. A punitive damages claim is one we
13 must prove by clear and convincing evidence. We
14 have to show that the conduct is either grossly
15 negligent or grossly reckless or intentional, and I
16 don't think there is any doubt that we've done
17 that.

18 I'll point to the fact that Dr. Kuffner came
19 up here and he wanted to talk about the history of
20 the company, but then when I cross-examined him, he
21 hadn't read the documents. He read some of the
22 documents, but he didn't read all of the documents.
23 He admitted. He said, "I can't tell you what those
24 executives were thinking."

25 The only evidence you have of what those

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3951

1 executives were thinking is what they wrote down on
2 paper. And it is clear, it is unambiguous, and it
3 is without doubt: They knew there was a problem,
4 they understood it was deadly, and they never said

5 a word to anybody.

6 And then they went one step further. Instead
7 of just not saying a word, which is bad enough,
8 they stopped anybody else from saying a word. They
9 went out and told Harvard to take it out of the
10 article, right? They went to these consumer
11 articles, "Don't do that."

12 When Dr. Cramer published his research, they
13 said, "No, no, Dr. Cramer don't give public
14 interviews about this," because they knew the
15 consequences of that were devastating for them.
16 And I'm not going to tell you how much money
17 punitive damages should be.

18 It has to be an amount of money that a company
19 like Johnson & Johnson would recognize as
20 meaningful, that they will go back -- that
21 Dr. Kuffner, who I think in this courtroom, will
22 call his CEO and say, "This is a problem and we
23 need to stop blaming COVID and air-conditioners and
24 we need to say, hey, this is a problem, we are
25 doing the right thing, it's not a problem anymore."

1 Now, LTL, you'll remember, I had a couple
2 lines up here and I was drawing this way and that
3 way to show you where they had done this. LTL is
4 the second defendant in this case. They replaced a
5 company that used to actually make and manufacture
6 Johnson's Baby Powder. Of course, they don't
7 anymore. They don't sell anything. You can't get
8 anything from LTL on the shelf.

9 They put \$30 billion away -- it's a funding
10 agreement -- to pay for litigation like this. So
11 there's two defendants; there's Johnson & Johnson
12 that is worth \$377 billion, and there's LTL that is
13 worth \$30 billion and some change. And they put
14 that money away to fund the defense of litigation
15 like this and resolve those claims.

16 So it either goes to their claims or claimants
17 in this type of litigation. And they deserve
18 punishment too because they are responsible for the
19 conduct of Johnson & Johnson Consumer, Inc., the
20 company that essentially had responsibility for
21 baby powder from 1979 until this company was
22 created.

23 So let's walk through our verdict form.

24 How much time do I have?

25 THE COURT: You've used 40 minutes.

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3953

1 MR. OLIVER: Great.

2 So this is what your verdict form will look
3 like. The Judge is going to give you some
4 instructions. I wish it was as easy as just
5 answering the questions that I put in my
6 PowerPoint, but it's not. And of course, you have
7 to follow those instructions.

8 As I walk through the verdict form, I'm going
9 to go over some of the things the instructions will
10 say. So the first question is about legal cause.
11 Was Johnson's Baby Powder the legal cause of
12 Marilyn Seskin's primary peritoneal cancer?

13 And as I said, legal cause doesn't have to be
14 the cause, it merely has to be a substantially
15 contributing cause, and that's why I used the
16 forest fire analogy. So I think you should check
17 yes there.

18 Was defendant's baby powder defective in
19 design or warnings? A product defect claim --
20 there is going to be instructions about this --
21 depends on something in Florida called the consumer

22 expectations test. It's based on what a reasonable
23 consumer -- it's not about what Marilyn Seskin
24 would have thought about, it's about what a
25 reasonable consumer would expect out of the

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3954

1 product.
2 If the product doesn't perform as expected,
3 then it's defective. So if you think of a gun, a
4 gun shoots; well, that performs as it's expected.
5 But this was a product that they told you was safe
6 enough for your baby, that you could put all over
7 your body, it has asbestos contamination in it, it
8 had fibrous talc, it had platy talc, and all of
9 those things they knew led to the formation of
10 ovarian cancer. And an ordinary, average consumer
11 looking at a baby powder bottle would not think
12 that.

13 The important thing about this is companies
14 like Johnson & Johnson are responsible for setting
15 consumer expectations. So if you want to know
16 under the law what the expectations for a product
17 are for a reasonable consumer, you look at the

18 messages that the defendants put out.

19 So I think you should check yes because it was
20 defective. It was defective in its design and it
21 was also defective because they failed to warn.
22 And there is no dispute they didn't warn. They
23 said they didn't warn, they said they didn't have
24 to warn.

25 Was Johnson & Johnson negligent in designing

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3955

1 or failing to warn about defendant's baby powder?
2 Of course the answer to that is yes. We've shown
3 much more than negligence. We've shown an
4 intentional course of conduct. We've shown they
5 knew their mines could not be cleaned.

6 We've shown they knew they could not get the
7 asbestos completely out of their powder and they
8 did it anyway. That is far greater than
9 negligence, which is simply what a reasonable
10 person would do. No reasonable person would do
11 that.

12 By the way, when you think about this conduct,
13 there is an instruction there that you can't treat

14 corporations differently than you treat an
15 individual person. And I love that instruction
16 because in this country, if you are a person, like
17 me, or you're a company, like Johnson & Johnson,
18 you are not entitled to special treatment one way
19 or the other.

20 So when you think about what they did for
21 50-some-odd years since the early '50s, you have to
22 treat them like you would treat a normal person.
23 You cannot shrug it off and say, because they are a
24 business, they get to do this. Look at them just
25 like you would one individual person who did this

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3956

1 and had this many resources and this much money and
2 they put it all into this purpose.

3 Did Marilyn Seskin rely on any statement made
4 by defendants that misrepresented, concealed, or
5 omitted material facts about defendant's Baby
6 Powder? And if so, was that reliance a legal cause
7 of Marilyn Seskin's cancer? This is our fraud or
8 misrepresentation claim.

9 Essentially, the question is: Did Marilyn

10 Seskin hear the statement or statements that they
11 made -- that would be their course of advertising
12 conduct, their course of denials through
13 newspapers -- and did she take that in and rely on
14 that? In other words, when she heard it, did she
15 believe it? Did it affect her life?

16 We heard evidence from Bob that she liked
17 Johnson's Baby Powder so much that when he
18 accidentally got the wrong brand shortly before her
19 death, before she understood about the connection,
20 she said, "No, go back and get Johnson's because I
21 trust that." It was only at the end of her life
22 that she realized this connection. She had been
23 desperately searching for a cause and she realized
24 it right at the end of her life, but she trusted
25 that company. We put some Band-Aids into evidence.

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3957

1 She bought all of their stuff. She wouldn't use a
2 different baby powder. So the answer to that is
3 yes.

4 The next question is: Did Marilyn justifiably
5 rely on any statement negligently made by

6 defendants that misrepresented a material fact
7 about defendant's Baby Powder?

8 There is an intentional fraudulent
9 misrepresentation claim and there is a negligent
10 misrepresentation claim. It's basically the same
11 claim. The negligent misrepresentation claim is a
12 lower standard, but I don't think there is any
13 doubt in anybody's mind that what they did was
14 intentional. It wasn't just unreasonable, it was
15 certainly unreasonable, but it was intentional
16 conduct.

17 Under number 6, did Marilyn Seskin rely on any
18 statement that was made in furtherance of
19 defendant's agreement to conceal or omit a material
20 fact about defendant's baby powder? And if so, was
21 that reliance a legal cause of her cancer?

22 This is about the conspiracy. This is about
23 Johnson & Johnson getting together -- if you look
24 back, there are documents from the '70s where they
25 were working with the CTFA, and that continued all

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3958

1 the way up until very recently. This is about that

2 conspiracy.

3 Did she rely on those false statements that
4 Alfred Werner said were false? They were saying
5 there's no real association, there's no real
6 association. That is what this is about, and
7 obviously the answer is yes. They went out there,
8 and half of what they did -- not everything they
9 did, but half of what they did was through the CTFA
10 in conjunction with other people.

11 What is the total amount of damaged sustained
12 by Robert Sugarman for the loss of Marilyn Seskin's
13 support and services? Support and services is not
14 his emotional damage and his loss of her life.
15 It's a very practical thing.

16 I think during my examination, I asked him
17 about that, and Bob talked about the things she did
18 around the house. There is no sure way to value
19 that, but you remember that testimony.

20 Medical expenses, you've seen that evidence.
21 We put it on the board. And this one is the one
22 that we are really talking about, loss of
23 companionship and protection for Robert Sugarman's
24 pain and suffering as a result of Marilyn Seskin's
25 injury and death.

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3959

1 Then at the end of the verdict form, you have
2 to indicate what percentage of responsibility --
3 how you divide that responsibility up among Johnson
4 & Johnson and LTL, and just remember that LTL is
5 responsible for the conduct of JJCI. You'll see
6 their documents in the documents you have, and they
7 took over in about 1979, I believe is what the
8 evidence shows.

9 Number 9 is: State whether, under the
10 circumstances of this case, you find by clear and
11 convincing evidence that punitive damages are
12 warranted against both parties. And again, I don't
13 think there is any doubt about that. They did
14 everything they did -- it was reckless, but they
15 did everything they did intentionally. And it was
16 with a diabolical level of intentionality.

17 They sent money to the scientists acting like
18 they were going to help them do the research. Of
19 course, they weren't. They were trying to combat
20 it. Every time a regulator got near it and started
21 sniffing it out, they got together with their
22 buddies in the mining industry and they tamped that

23 down so regular, ordinary consumers like Marilyn
24 Seskin would not know about that.

25 So I think the answer is yes, yes. And then

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3960

1 you have amount. I'm going to leave that to you.
2 I can't tell you how to do that. I'm not telling
3 you to do anything unreasonable, but I'm telling
4 you companies that have that much money and that
5 many resources, it's a lot like a speeding ticket.
6 If I go out and I a speeding ticket -- I don't get
7 a lot of speeding tickets these days, but when I
8 was 16, I did. I remember I got one that was \$188,
9 which was a big one. I had just gotten a car and I
10 was sweating it. I was in a bad mood because I
11 didn't have \$188, right? I was like, "I've got to
12 go ask my dad for money. I have to tell him I got
13 a ticket."

14 That amount of money to me, when I was 16
15 years old, mattered. If you punish them with a
16 million dollars, that doesn't matter to them.
17 That's a rounding error. They could lose that much
18 money in the crack of their car seat and it would

19 never occur to them. It wouldn't be a big deal.

20 So you have to pick an amount of money that will
21 get their attention, and I leave that to your
22 discretion.

23 Ladies and gentlemen of the jury, thank you so
24 much for your time. I cannot tell you how much I
25 appreciate this. I've always wanted to get picked

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3961

1 for jury service, and because I'm a lawyer, I never
2 do. So I actually sit in my chair and I get envy
3 because you have the power to do this and I don't.

4 I know you guys think that's funny, but I do.
5 I'm a big law nerd, right, but I've always wanted
6 to be on a jury because only you guys get to make
7 this decision. Judge Thomas doesn't, and I don't.
8 Justice is in your hands and we trust you.

9 Thank you.

10 THE COURT: Thank you.

11 Anything on behalf of the defense?

12 MS. BROWN: Yes, Your Honor. May I begin,
13 Your Honor?

14 THE COURT: You may.

15 MS. BROWN: Good afternoon, everyone. We made
16 it to the end.

17 I want to first start by thanking you all.
18 You all have been an incredibly patient and
19 attentive jury. You have showed up on time every
20 single day. You have had to wait for us a whole
21 bunch, but we have never had to wait for you. And
22 we know that your jury service here has taken you
23 away from your homes, from your families, from your
24 jobs, and from me, from Ms. Diolombi, and from most
25 importantly, Ed Kuffner and the folks at Johnson &

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3962

1 Johnson and LTL, we want to really sincerely thank
2 you for your jury service.

3 So we are at the end of the case now, folks,
4 and you have seen everything that the plaintiff's
5 lawyers have to try and prove to you that if
6 Marilyn Seskin had never used Johnson's Baby
7 Powder, she would never have gotten cancer. That
8 is what they need to prove in this case.

9 And respectfully, they haven't come close to
10 doing it because that's not the scientific truth

11 and there are no evidence and there are no facts in
12 the case that would support that. The very first
13 question that you are going to be asked on that
14 verdict form that counsel put up just a moment ago
15 is to determine by a greater weight of the evidence
16 if the defendant's product, Johnson's Baby Powder,
17 was the legal cause of Dr. Seskin's unfortunate
18 primary peritoneal cancer.

19 And what that means is you have to determine
20 by evidence that came into this courtroom that
21 Johnson's Baby Powder directly caused her cancer,
22 contributed to substantially cause her cancer, such
23 that it can reasonably be said that but for her use
24 of the product, she would not have gotten this
25 awful cancer. That means they have to prove to you

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3963

1 it is more likely than not that if she had never
2 used talc, she would never have gotten cancer. And
3 their own experts couldn't even say that because
4 it's not the scientific truth.

5 Dr. Chan -- we were here for weeks listening
6 to Dr. Freidenfelds and Dr. Plunkett about old

7 company documents, and then finally at the very,
8 very end of their case, they brought one expert to
9 talk about Dr. Seskin, and it was Dr. Chan, the
10 only expert for half a day, on the most important
11 question in the case. And he admitted on the stand
12 that he can't say that if she had never used talc,
13 she would never have gotten cancer.

14 "Dr. Chan, you would never promise a woman if
15 she just didn't use talc, she wouldn't get ovarian
16 cancer?" He said of course not. There is
17 genetics, there's endometriosis.

18 You remember Dr. Ness. She was here and
19 admitted there are many unknown factors about the
20 cause of cancer. We mostly don't know what causes
21 ovarian cancer. Dr. Ness agreed that in general,
22 we don't understand the biology of ovarian cancer
23 at all.

24 What the evidence showed in this case is that,
25 unfortunately, Dr. Seskin had almost all of the

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3964

1 recognized risk factors for ovarian and primary
2 peritoneal cancer. You heard about age. The

3 average age that a woman gets ovarian cancer is 63
4 years old, and unfortunately, Dr. Seskin was 66
5 years old. And you saw this article with Dr. Saenz
6 just yesterday that for every year after age 50, a
7 woman's risk of getting ovarian cancer,
8 unfortunately, increases by 4 percent.

9 And what that means is that by the time
10 Dr. Seskin was diagnosed, she was at a 64 percent
11 increased risk of ovarian cancer. And why is this
12 important? Dr. Ness told you the answer to the
13 very first question on this verdict form: Age
14 alone can be the cause of somebody's ovarian
15 cancer.

16 Dr. Ness, "A woman can get ovarian cancer for
17 no other reason other than her age?" She said yes.
18 That answers your first question. They have to
19 prove to you that if Dr. Seskin had never used
20 talc, she never would have gotten ovarian cancer,
21 and their own expert told you that's not true.
22 Because what we know is true is many times women
23 get ovarian cancer for no other reason other than
24 age or having no other risk factors.

25 Nulliparity, both experts agreed,

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3965

1 unfortunately, not having children puts a woman at
2 risk for ovarian cancer, and that was a decision
3 that Marilyn Seskin made throughout her lifetime.
4 You heard never using birth control pills can also
5 put a woman at risk for ovarian cancer, and that
6 too was a risk that Marilyn Seskin had. Dr. Ness
7 even said it's causal in the opposite direction,
8 meaning if you take birth control, you can actually
9 prevent it.

10 You heard a lot with Dr. Saenz about hormone
11 replacement therapy and the risk that Dr. Seskin
12 was at because of her use of hormone replacement
13 therapy. And you saw records like this one that
14 she was using compounded prescriptions that weren't
15 FDA approved for a number of different hormone
16 replacement therapies, estrogen, testosterone, and
17 progesterone. And we reviewed the record from 2008
18 when her doctors told her that she needed to reduce
19 those records.

20 And one of you folks asked a really great
21 question of Dr. Saenz: What are the implications
22 of that? What are the implications of some of
23 those very, very high hormone levels that we looked

24 at? And Dr. Saenz explained that in a woman's
25 body, testosterone is converted to estrogen, and

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3966

1 that puts a woman at risk of not just ovarian, but
2 also endometrial and potentially breast cancer.

3 And you saw the actual laboratory reports with
4 Dr. Saenz just yesterday showings that,
5 unfortunately, Dr. Seskin had levels that were more
6 than double the reference range through multiple
7 years and was instructed -- obviously by her
8 physicians -- to cut down those levels.
9 Unfortunately, that put her at risk for ovarian
10 cancer.

11 You heard a lot about endometriosis because
12 there were many references in Dr. Seskin's medical
13 records to her history of endometriosis and we saw
14 Dr. Seskin herself confirmed that she was diagnosed
15 with endometriosis in 1995, but when Dr. Chan was
16 here, he said he discounted that testimony; that he
17 totally discounted what Dr. Seskin had said
18 herself.

19 And then you heard today from Dr. Felix looked

20 at her tissue under the microscope and saw the
21 physical actual evidence of what was reported in
22 her medical records, that she did indeed have
23 confirmed findings of endometriosis. And that too,
24 unfortunately, put her at risk for ovarian cancer.

25 You heard Dr. Saenz talk about just being of

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3967

1 the Ashkenazi Jewish descent could put a woman at
2 risk for ovarian cancer, and then you heard that
3 even though Dr. Seskin did not have BRCA 1 or
4 BRCA 2, she did have a gene mutation. And these
5 are notes that came into evidence through
6 Mr. Sugarman because he said that one of the great
7 things he did for Dr. Seskin was he went her to the
8 medical appointments and wrote down what the
9 doctors were saying.

10 And I think he described it as writing down
11 word for word what the physicians were saying. And
12 what he wrote down in this meeting with the
13 genetics counselor was that the FANCC gene could
14 possibly have caused this. "Maybe the underlying
15 explanation."

16 They have to prove to you that if she had
17 never used talc, she never would have gotten cancer
18 but their own medical doctors were pointing to
19 other possible causes. And we know generally that
20 ovarian cancer is generally unknown what the cause
21 is.

22 Dr. Ness said we can't even evaluate risk
23 factors we don't know about today. There is so
24 much about this disease that we still don't know
25 about. And one of you asked a terrific question

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3968

1 here: Well, just because you are negative for
2 BRCA 1 or BRCA 2, that doesn't mean you're at an
3 increased risk?

4 And Dr. Saenz explained that's absolutely
5 correct. Because this is a disease we know so
6 little about, being negative for the two mutations
7 we happened to have discovered in the last 30 years
8 is not indicative of not having a genetic risk.

9 And I heard counsel this morning talk about a
10 fire in the forest and a match. There is not a
11 shred of evidence that came into this case to

12 suggest that talc can work in combination with any
13 of these known risk factors to light a fire or
14 cause ovarian cancer. That was not the evidence or
15 theory of the case that the plaintiffs brought to
16 you.

17 Dr. Chan did not testify that using talc makes
18 a woman of a certain age more susceptible, or using
19 talc makes hormone replacement therapy more
20 susceptible. Dr. Chan testified only that talc was
21 the cause. And so this idea about talc starting a
22 fire is completely inconsistent with the evidence
23 that came in in this case. And in any event, they
24 have to prove that was there no talc, she would not
25 have gotten cancer, and the science and the

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3969

1 evidence and the facts do not support that.

2 Dr. Chan was the only doctor to conclude that
3 talc was a cause. And he explained to you he's he
4 never said that to a single one of his patients.

5 To his absolute credit, he is a gynecologic
6 oncologist. Like Dr. Saenz, his job is treating
7 women who are suspected to have cancer or who have

8 a cancer diagnosis, and he told you never has he
9 told a single patient of his what he told you-all
10 in this courtroom where he was getting paid \$10,000
11 a day.

12 He never wrote a single article about talc,
13 and you learned he formed his opinion that talc was
14 the substantial cause after reviewing 2.75 hours of
15 medical records, one hour of which were podiatry
16 records. You-all will have to sort through and the
17 judge will instruct you: You-all are the judges of
18 the credibility of the testimony that came before
19 you. You have to evaluate testimony like this,
20 that is different in this courtroom than it is
21 outside to his own patients.

22 He said he doesn't really have time to tell
23 patients about talc. This is a doctor who came in
24 to tell you he believes there is a consumer product
25 that could kill women, and his testimony was he

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3970

1 doesn't have time to let his own patients know
2 about it. You'll have to sift through how that
3 could make any sense.

4 You'll have to judge Dr. Chan's credibility,
5 because if he truly believed he had figured out a
6 cause of ovarian cancer, wouldn't you want and
7 wouldn't you expect that he would find the time to
8 mention it to his patients?

9 You looked at his own book where he was
10 credited in the beginning of the book for adding
11 additional contributions to the gynecological
12 section, and we looked at the risk factors and his
13 own book does not identify talc as a risk factor.
14 What he came in here to tell you is not what he
15 tells patients and not what he writes about in a
16 book that was made as a guide for people treating
17 in this area.

18 You heard that every single United States
19 public health authority disagrees with the lawsuit
20 claims that are being put before you-all for
21 millions and millions --

22 MR. OLIVER: Objection, Your Honor. That's
23 facts not in evidence.

24 THE COURT: Ladies and gentlemen, rely upon
25 your own independent and collective recollection as

1 to what the testimony was.

2 MS. BROWN: The National Cancer Institute that
3 every single expert that came in here agreed is a
4 respected cancer authority. The National Cancer
5 Institute funded cancer research for experts on
6 both sides of the aisle. Nobody quibbles with the
7 National Cancer Institute.

8 And you heard what the National Cancer
9 Institute is they organize and evaluate risk
10 factors in three different categories: Adequate
11 evidence of a risk, uncertain evidence of a risk,
12 and inadequate evidence of a risk. And perineal or
13 feminine use of talc, updated just a few months ago
14 at the end of 2023, is in the inadequate evidence
15 of an association with ovarian cancer and primary
16 peritoneal cancer.

17 This is remarkable because everything they are
18 relying on is public. All of those case-control
19 studies that they claim are to the right of one,
20 the FDA's alleged finding in 2019, all of this data
21 is public and available to very well-respected
22 researchers at the National Cancer Institute. And
23 as recently as just a few months ago, they have
24 again concluded there is inadequate evidence of an

25 association to find that Dr. Seskin's cancer would

↑

3972

1 not have happened if she had not used talc. That's
2 what you have to find for legal cause.

3 For you to find that, you would have to reject
4 the findings of the National Cancer Institute who
5 doesn't even recognize an association. And the
6 National Cancer Institute, we heard, has a board,
7 an editorial board. We went through with one of
8 the experts all of the institutions where members
9 of that board comes from. These folks have nothing
10 to do with this case.

11 These are treating physicians at places like
12 MD Anderson and Harvard whose job it is, multiple
13 times a year, to keep up with the evidence, the
14 published scientific evidence on this issue, and
15 put out recommendations for women, for doctors, for
16 patients for the public, and they have determined
17 that the claims in this case are not supported by
18 is science. Nobody quibbles with them being a
19 well-respected institution. You've heard from
20 experts all across the board, well-respected

21 authority in the area.

22 But it's not just the National Cancer
23 Institute. It's also the American Cancer Society.
24 Dr. Ness told us from the stand that she has cited
25 to this publication in her own papers, that she

↑

3973

1 believes the American Cancer Society is a reliable
2 cancer authority that is in the business of trying
3 to cure and prevent cancer.

4 And as recently as this year, January of 2024,
5 the American Cancer Society concluded the weight of
6 the evidence does not support an association
7 between ovarian cancer and genital exposure to
8 talc-based products. And again, they have access
9 to everything that the plaintiff's lawyers have put
10 before you.

11 All of those studies are available in the
12 public scientific literature to the American Cancer
13 Society. Alleged contamination of cosmetic talc
14 has been investigated and looked into since the
15 1970s. There is nothing in the scientific
16 literature that the folks at the American Cancer

17 Society could not have evaluated in coming to this
18 conclusion.

19 We went through other public health
20 authorities here in our country like the CDC. The
21 CDC too identifies recognized risk factors and does
22 not recognize talc. In fact, you heard that the
23 CDC has recommended treatment guidelines for
24 sexually transmitted diseases, and actually
25 recommends the use of talc in the genital area.

↑

3974

1 This is as recently as just a few years ago.

2 You heard the Society for Gynecologic
3 Oncologists that Dr. Chan and Dr. Saenz are members
4 of. These are doctors who are devoted to taking
5 care of patients who have suspected gynecologic
6 cancers, and the very first thing that they say
7 their risk factor for ovarian cancer section is
8 doctors don't know what causes most ovarian
9 cancers. And nobody came in here to disagree with
10 that. Dr. Ness agreed, Dr. Chan agreed, certainly
11 Dr. Saenz agreed.

12 But they identify certain risk factors, and

13 here too, they do not identify talc.

14 The American College of Obstetricians and
15 Gynecologists, another professional organization of
16 doctors caring for women. They too do not
17 recognize talc, but they have a special statement
18 that they put out on talc confirming and concluding
19 that there is no medical consensus about the claims
20 the plaintiffs have brought to you in this lawsuit.
21 There is no consensus that talcum powder can
22 increase a women's risk for ovarian cancer.

23 In 1994, you heard about a two-day symposium
24 that the FDA held for anybody who wanted to attend
25 in the scientific community. This was public

↑

3975

1 information and a public debate about the very
2 issues you've heard about in this courtroom. And
3 the conclusions were that talc is the safest of all
4 consumer products.

5 And you-all, as you think about what Johnson &
6 Johnson did and how Johnson & Johnson participated
7 in events like this, need to think about what the
8 discussion was at the time. When a scientific

9 question was being raised, how did the scientific
10 and industry community respond? And what the
11 evidence and what the documents show is that
12 Johnson & Johnson participated in these scientific
13 evaluations here, where the conclusion was talc was
14 the safest of all consumer products.

15 One of the claims plaintiffs have in this case
16 is that Johnson's Baby Powder should have had an
17 ovarian cancer warning on it. The FDA said no.
18 You heard about a citizens' petition too, actually,
19 that were sent to the FDA asking for the very thing
20 plaintiffs claim in this case: Put an ovarian
21 cancer warning on the product.

22 And the FDA conducted a multiyear
23 investigation into the epidemiology and into the
24 chemistry and toxicology. This is in evidence
25 P2010, and you can see if for yourself that our

↑

3976

1 country's FDA did to determine that the science
2 does not support these claims.

3 And to be clear, in this document, the FDA
4 considered the possibility that talc could be

5 contaminated with asbestos because the FDA has been
6 testing and looking into that issue since the 1970s
7 and they concluded no causal association between
8 talc and ovarian cancer.

9 And finally, Dr. Saenz told you about the
10 Ovarian Cancer Research Alliance, and she talked to
11 you about how this organization is dedicated to
12 conducting research in an effort to find out what
13 causes this horrible disease. And they too have a
14 current statement that this connection that's being
15 put before you-all in this courtroom is not proven
16 in science.

17 And specifically, they make a statement about
18 lawsuits like this one. And specifically, the
19 Ovarian Cancer Research Alliance says: We will not
20 change our advice to patients based on lawsuits.

21 It is no secret to you guys at this point in
22 this case that we have become a target in
23 litigation; that this is not the only case that we
24 are defending; that there is enormous
25 misinformation in the public that led to the

1 discontinuation of this product. But the Ovarian
2 Cancer Research Alliance says it will not change
3 the way that they advise women.

4 Dr. Saenz, I asked, "Do they specifically
5 speak to litigation?" And she said they do. They
6 say that, "As clinicians in the OCRA, we should not
7 be practicing medicine based on matters of
8 litigation, but we should stay focused on the
9 science."

10 Plaintiff has not come close to meeting his
11 burden to you-all to proving that there was
12 scientific support that had Dr. Seskin not used
13 baby powder, she would not have gotten cancer. We
14 know there are a number of risk factors she had
15 that their own experts admit could have caused
16 cancer.

17 Not a single United States public health
18 authority concludes that cosmetic talc causes
19 ovarian or primary peritoneal cancer. Not one of
20 plaintiff's treating doctors came into this case to
21 support the claims that are being made here. And
22 you heard and we reviewed, she had very good
23 doctors who were looking out for cancer prevention.

24 You recall with Dr. Chan, we reviewed
25 articles, medical records like this one from

↑

3978

1 Dr. Trabin because, you remember, he was following
2 her for an ovarian cyst that turned out to be
3 benign, but his records were filled with concerns
4 that it might have been cancer, and filled with
5 concerns of what he could best do to help prevent
6 cancer in Dr. Seskin. And there is not a shred of
7 evidence in Dr. Trabin's records or anyone else's
8 records that they had any concern about her use of
9 talcum powder.

10 And Dr. Saenz told you that if she truly
11 believed that there was something that increased a
12 woman's risk for ovarian cancer, she would tell
13 that to all of her patients. You heard a
14 suggestion from Dr. Chan that gynecologic
15 oncologists are too busy. Dr. Saenz said no such
16 thing. If she knows of something that could help
17 her patients, she would tell them.

18 Dr. Seskin was treated around the country at
19 top institutions. You heard from Mr. Sugarman they
20 went to providers here in Florida, and they sought
21 second opinions around the country, Dana Farber, MD

22 Anderson, and not one of those doctors, not one of
23 those specialists that she saw came in here to
24 support the claims that are being made in this
25 lawsuit.

↑

3979

1 Mr. Sugarman even talked to you about a
2 specific treating physician, Dr. Brian Slomovitz.
3 And you had the opportunity to look at
4 Dr. Slomovitz's published article questioning
5 whether asbestos should be linked to ovarian cancer
6 at all. Dr. Slomovitz did not come in here to
7 support these claims. In fact, the only evidence
8 in Dr. Seskin's medical records was a
9 recommendation to use talc.

10 The only evidence of talc that we saw was
11 notes of a meeting with the physician recommending
12 Gold Bond medicated talc. And one of the things
13 you have to sift through and consider as you
14 evaluate the credibility of the claims in this case
15 is that Marilyn Seskin and Mr. Sugarman continued
16 to use cosmetic talc, even after they decided to
17 sue us.

18 You heard about decision to sue and then you
19 heard about continued usage by Dr. Seskin and you
20 heard from Mr. Sugarman say on the stand he
21 continues to use cosmetic talc today. You'll have
22 to evaluate whether or not that make sense and sift
23 through the evidence.

24 What the evidence has shown is that plaintiff
25 has the burden. It is only plaintiff's burden to

↑

3980

1 prove to you by the greater weight of the evidence
2 that had Dr. Seskin not used talc, she would not
3 have primary peritoneal cancer, and they brought
4 you no physical evidence. It is their burden alone
5 and nobody tested the bottles.

6 You heard Mr. Sugarman still had bottles in
7 the house that he claimed Dr. Seskin had used. One
8 of them happened to be cornstarch, a couple of them
9 are small bottles. We asked Dr. Rigler, "How come
10 you didn't test them? You came in here to talk
11 about testing of old J&J bottles, how come nobody
12 tested these bottles?" The claims are that these
13 bottles contain asbestos, contain fibrous talc,

14 contain carcinogens, and no one asked Dr. Rigler to
15 test them.

16 You heard similarly that Dr. Rigler frequently
17 does something called a tissue digestion. He's
18 done hundreds and hundreds of tissue digestions,
19 including for these very plaintiff's lawyers. And
20 he told you one of the things about a tissue
21 digestion is it can show asbestos that has been in
22 the body for a very, very long time.

23 But again, he wasn't asked to do it here.
24 They had the pathology, they had the expert and no
25 one asked him to digest the tissue so they could

↑

3981

1 bring you-all the proof of what their burden is to
2 show. If there is really asbestos in the bottle,
3 if there was really asbestos in the tissue, why
4 haven't they met their burden or tried by bringing
5 you-all that evidence?

6 There was some suggestion maybe it was too
7 expensive on the redirect of Dr. Rigler, and he
8 said, well, actually, it was like \$1,000 to \$3,000.
9 That's less money than it costs for them to bring

10 in Mr. Diaz, who got paid \$1,300 an hour to tell
11 you Johnson & Johnson has a lot of money. This is
12 not the reason they did not digest the tissue.

13 And finally, they brought no evidence there
14 was actually inflammation. You've heard from
15 multiple witnesses that talc, when it's put in the
16 body, it causes an inflammatory response. That's
17 why it's used for talc pleurodesis. That's why
18 it's used as a medical treatment. It doesn't cause
19 cancer, it causes cells to become inflammatory so
20 that, for example, in pleurodesis, it can soak up
21 extra fluid and can help the lungs heal.

22 And yet the claim here is that there was
23 decades and decades of talc in the ovaries, in the
24 peritoneal cavity, and nobody saw any inflammatory
25 reaction. Dr. Sitelman said there was no

↑

3982

1 granulomas, no foreign body cells, no evidence, and
2 Dr. Felix showed it to you.

3 He showed you that what you would have to
4 have; if there actually was an inflammatory
5 reaction, what you would have to see. And then he

6 showed Dr. Sitelman's pictures, no evidence of a
7 foreign body response in the tissue.

8 This is a physical problem of the evidence
9 with the claims that are coming before you. The
10 claim in this case is that there were decades and
11 decades of talc ascending up the reproductive tract
12 to cause inflammation that was great enough to
13 cause cancer, and even their own expert who looked
14 at tissue couldn't come in here and identify any
15 inflammation. How could there have been decades
16 and decades of inflammation that lead to cancer and
17 nobody can find it?

18 Both experts agree there was no evidence of
19 asbestos. Again, it doesn't make any sense. If
20 the talc that she used for decades was contaminated
21 with asbestos, how come when both experts went to
22 look, there wasn't any in the tissue? How come
23 when Dr. Saenz reviewed the medical records, there
24 was no evidence of any radiological findings that
25 are consistent with asbestos exposure? Pleural

↑

3983

1 plaques, asbestosis, mesothelioma, no physical

2 evidence of any of the claims that plaintiffs are
3 making in this lawsuit.

4 The overwhelming evidence is that Johnson's
5 Baby Powder does not cause primary peritoneal and
6 ovarian cancer. And here is the common sense part
7 of this claim, and the Judge will instruct you on
8 the law later today, and you are going to hear one
9 of the things you can use in deciding the claims in
10 this case is your common sense. And this doesn't
11 make common sense.

12 Johnson's Baby Powder has been used by
13 hundreds of millions of people, not just in our
14 country, but around the world, but the disease that
15 plaintiff's lawyers in this lawsuit in front of
16 you-all claim it causes is extraordinarily rare.
17 Thank goodness ovarian cancer only affects about
18 19,000 women a year. And remember, Dr. Seskin
19 didn't have ovarian cancer and she herself was
20 clear about it.

21 We looked at this email that she sent the
22 providers making clear it wasn't an ovarian
23 neoplasm, it was primary peritoneal. And that's
24 important because primary peritoneal cancer is even
25 more rare than ovarian cancer. So 19,000 women

↑

3984

1 diagnosed with ovarian cancer every year, but only
2 about 1,000 women, thankfully, are diagnosed with
3 primary peritoneal cancer each year.

4 And this is the part of this lawsuit claim
5 that doesn't make sense: If Johnson's Baby Powder
6 had asbestos, if Johnson's Baby Powder caused
7 primary peritoneal, of all the women in the United
8 States that have used this product, there should be
9 an epidemic of primary peritoneal cancer, and
10 thankfully, there is only about a thousand cases
11 diagnosed each year, .0007 percent. It doesn't
12 make sense.

13 You heard from Dr. Sitelman, he's only seen
14 four or five cases in his 40-plus years of
15 practice. This is an extraordinarily rare disease.

16 Scientists, you've heard, and we went over it
17 with a number of different witnesses, have studied
18 the potential connection between talc and ovarian
19 cancer for decades. You heard about some of the
20 very -- and this is an important point as you think
21 about the scientific evidence that came to you in
22 this case. The allegations in this case, of

23 course, as you heard, is that talcum powder was
24 contaminated with trace asbestos or trace fibrous
25 talc, but both epidemiologists agree that no matter

↑

3985

1 what was in Johnson's Baby Powder, it would have
2 been picked up in the epidemiology.

3 So the best place to look, if you want to know
4 if the product can increase your risk of ovarian or
5 primary peritoneal cancer, is the epidemiology
6 because it studied women using the products. And
7 this has been studied for decades. You heard about
8 the Nurses' Health Study; a huge study, 78,000
9 participants, nurses who were followed for decades.
10 No association with talcum powder use and no dose
11 response.

12 Women's Health Initiative was an even bigger
13 study, that went on about a decade or two after the
14 Nurses' Health Study, same findings. You heard
15 about the Sister Study where douching, but not
16 talc, was associated with an increased risk of
17 ovarian cancer.

18 And then you heard about the O'Brien study

19 that put all of these studies together that came to
20 the ultimate conclusion that, based on 250,000
21 participants, that there was no association between
22 talc use and primary peritoneal cancer. And what's
23 important about these studies is they are the
24 studies that the public health authorities -- in
25 coming to the conclusion that talc is not a risk

↑

3986

1 factor for this disease, these are the studies that
2 the health societies rely on.

3 You've heard interpretation in this courtroom
4 about what the plaintiff's experts think of these
5 studies, but look at what people outside of this
6 courtroom think. Look at what doctors like
7 Dr. Gossett and Dr. Del Carmen say. When the
8 O'Brien study was published in 2020 finding no
9 association, they wrote a letter to the editor
10 saying, "The findings of this study are reassuring.
11 Women should be reassured that the biggest and best
12 prospective study that put together all of this
13 data did not find an association." Dr. Gossett is
14 not being paid by us, not being paid by the

15 plaintiffs, and this is what she wrote. She is the
16 head of gynecologic oncology at NYU.

17 You heard from Dr. Saenz about all sort of
18 backward-looking studies that have found a
19 potential association with ovarian cancer; physical
20 inactivity, too much TV, processed meats. You
21 heard from Dr. Osann that coffee for decades was
22 associated with bladder cancer in the epidemiology,
23 and that's why these studies have to be interpreted
24 in the larger context of all of the evidence. I
25 thought on counsel's slide, he suggested that

↑

3987

1 Dr. Osann wanted to throw out some of these
2 backwards-looking studies. Not at all.

3 And the public health authorities don't do
4 that either. All of the data and all of the
5 evidence has to be evaluated. What these studies
6 show demonstratively by their data recall bias.
7 They show a difference between people who have
8 ovarian cancer and people who don't have ovarian
9 cancer, and each of these studies show and raise
10 this as a limitation of the study that has to be

11 considered.

12 This chart went up multiple times with
13 multiple witnesses, and it was suggested to you-all
14 that everything on the right-hand side showed a
15 risk. And that's not true and that's not the data
16 and Dr. Saenz explained why. Half of these studies
17 are not statistically significant. Half of these
18 studies have a line that crosses the one.

19 And what we heard from Dr. Saenz and what you
20 see in the published literature is that means there
21 is no association. If you look at, for example,
22 the Houghton study, the Women's Health Study, they
23 had confidence intervals that crossed one. And
24 when they described their findings, they said, "In
25 the large prospective study, ever perineal powder

↑

3988

1 use was not associated with ovarian cancer risk."

2 Half of the studies, even the ones they rely
3 on, don't even show an association. You heard
4 about what real risk ratios look like when there
5 has actually been a proven connection between a
6 substance and disease; smoking and lung cancer,

7 BRCA and ovarian cancer, HPV and cervical cancer.
8 These numbers are enormous. This was even too high
9 to put on our graph. More than 100 percent of a
10 relative risk. Talc is 1.28, and the
11 epidemiologists explained to you those low relative
12 risks make it even more likely that the findings
13 are confounded or impacted by recall bias.

14 If talc really caused ovarian cancer, you
15 should never see this. You shouldn't see, when you
16 look through all of these case-control studies, the
17 more you use, the less your risk. If it truly
18 causes ovarian cancer or primary peritoneal cancer,
19 the more you use, the greater your risk. And you
20 heard from Dr. Osann that is completely
21 inconsistent, even in the very studies the
22 plaintiffs rely on.

23 Just like there is no public health authority
24 that concludes talc causes primary peritoneal or
25 ovarian cancer, there is no epi study that



3989

1 concludes that either. And we heard this morning
2 the very basic building blocks of cancer have not

3 been established here. Before you even get to
4 epidemiology studies, you have to show that cells,
5 when exposed to this carcinogen, actually form
6 cancer. The first thing plaintiffs would have to
7 prove to you, they didn't bring anybody.

8 They didn't bring anybody to talk to you about
9 cell studies at all. But it's the building blocks
10 of proving causation, much less but for causation.
11 They have to prove to you that when you put talcum
12 powder on a cell, that cell changes. That cell
13 starts to become cancer. Something happens in that
14 cell that leads us to know or suspect that
15 something can happen in people.

16 And you heard from Dr. Boyd, none of these
17 studies show that. And you heard about an effort
18 by Dr. Saed, who is an expert paid for by lawyers
19 representing plaintiffs, to get studies published
20 that would show that, an effort in connection with
21 litigation to try to put into the scientific
22 literature something that would be helpful to their
23 case. And it was rejected time and time again.

24 And Ms. DiIombi went through some of the
25 comments from the peer reviewers about the science,

↑

3990

1 the methodology and data cannot be trusted. There
2 is no evidence in the scientific literature that
3 putting talc on cells does anything.

4 If there is no mutation in the cell, it can't
5 lead to cancer. And they haven't brought you
6 anything to show that putting talc on a cell would
7 lead to those changes.

8 Similarly, with the animal studies Dr. Boyd
9 reviewed those this morning. Talc being injected
10 into animals in two different studies, no evidence
11 of cancer. And the whole theory about how this
12 cancer would work, how this process would work
13 depends on talc outside of the body getting all the
14 way up through a woman's reproductive tract to her
15 ovaries or her peritoneum. And Dr. Saenz went over
16 the studies on which the plaintiff's experts rely,
17 and none of them mimic the actual way a woman would
18 use this product.

19 You heard from both Dr. Chan and Dr. Ness what
20 is also not going to make any sense about the
21 claims here. None of these folks think that talc
22 causes vulvar cancer. None of these folks think
23 that talc causes vaginal cancer. This is the

24 pathway by which talc is supposed to ascend to the
25 ovaries and peritoneum, but along the way, none of

↑

3991

1 the experts think that it causes cancer.

2 So somehow, talc travels all the way up a
3 woman's reproductive tract causing cancer nowhere
4 along there, but somehow causes ovarian or primary
5 peritoneal cancer? It's not going to make any
6 sense and there is not going to be any science to
7 explain that.

8 If talc is causing such inflammation that it
9 leads to cancer, why doesn't that happen anywhere
10 along the reproductive tract? And in fact, you
11 heard about the studies where talc is placed
12 closest to the ovaries, closest to the peritoneum,
13 and they universally show no increased risk. If
14 it's true that talc getting to the peritoneum
15 causes cancer, then talc on dusted diaphragms
16 should show an enormous risk.

17 And these studies, all of them, 100 percent of
18 them show no risk. One of them shows a protective
19 risk, that it would actually protect against

20 ovarian cancer.

21 There was an enormous amount of time spent on
22 Johnson & Johnson's conduct, so I want to spend my
23 final time with you-all talking about what Johnson
24 & Johnson did as this science was being
25 investigated and emerged.

↑

3992

1 Your Honor, can I ask for the time?

2 THE COURT: Sure. 41 minutes used.

3 MS. BROWN: Thank you very much.

4 You have heard this question about a link
5 between ovarian cancer and cosmetic talc, or a link
6 between asbestos and cosmetic talc has been
7 investigated in the literature for more than 50
8 years. And so if we start way back in the 1970s,
9 you can see in our documents that Johnson & Johnson
10 was going above and beyond what the industry was
11 doing to check and make sure their product was
12 safe.

13 This is a document we reviewed in evidence
14 talking about the testing that Johnson & Johnson
15 put in place for its product. And we talked about

16 the J-41 requirement, which was the industry
17 testing requirement, and Johnson & Johnson made
18 clear in its documents that it intended to surpass
19 that and that it intended to go above and beyond
20 what the industry was doing by using the most
21 sensitive microscope available at the time, and
22 indeed, the most sensitive microscope being used
23 today for testing of cosmetic talc. While the
24 industry was testing according to J-41, XRD and
25 PLM, Johnson & Johnson, as early as the 1970s, was

↑

3993

1 using transmission electroscop microscopy.
2 And one thing you have to think about is if
3 Johnson & Johnson was really trying to put out a
4 product that wasn't safe, to hide what it knew to
5 be asbestos in its product, why would it go beyond
6 the industry standard? Why would it employ a far
7 more sensitive methodology to try to make sure that
8 the product was pure and make sure the product was
9 safe? It doesn't make any sense.

10 Document after document show routine testing
11 of Johnson's Baby Powder for asbestos by the most

12 sensitive methods, and they conclude, as this one
13 does here from 1975, "It can be stated with greater
14 than 99.9 percent certainty that the ores and
15 materials produced at Windsor Mineral locations are
16 free from asbestos or asbestiform materials."

17 And this is one of the documents that
18 Dr. Freidenfelds had not seen. We'll talk about
19 Dr. Freidenfelds as we get towards the end, but
20 neither Dr. Plunkett nor Dr. Freidenfelds, both of
21 whom came in here to accuse us of selling a product
22 with asbestos, neither of them were familiar with
23 our six-month ore study, and neither of them had
24 this document as ones they had considered.

25 Similarly, neither of them knew about this

↑

3994

1 study. This was a three-year study done by our
2 government and Harvard looking into our Vermont
3 talc mines. They came in, they studied the
4 workers, and they took samples of the mine and
5 studied it using the most sophisticated technology
6 at the time and it revealed no asbestos. And
7 Dr. Plunkett and Dr. Freidenfelds came in here to

8 accuse us of having asbestos in our talc never
9 having reviewed this three-year government study.

10 We heard a lot about early reports in 1970s
11 about scientists at the Tenovus Institute that
12 found ovarian tissue and cervical tissue with talc,
13 but what we didn't talk about, and what counsel
14 didn't concentrate on, is this: They found no
15 asbestos in any of the tissue, and they stated in
16 the article itself, "This should not be considered
17 as indicative of cancer."

18 And what is critical and important about this
19 is it wasn't just ovaries that were malignant,
20 ovaries that had tumors. They found talc in normal
21 ovaries, in malignant ovaries, in normal cervixes,
22 in malignant cervixes, and they said there is no
23 connection between this finding and disease.

24 And what Johnson & Johnson did, as soon as it
25 heard about this, is it went over there. It went

↑

3995

1 to the institute to try to figure out what was
2 going on, to investigate these findings. And this
3 is the document. None of us was around when this

4 happened in 1971. None of us was at Johnson &
5 Johnson then.

6 The only information we have on how Johnson &
7 Johnson acted and responded is in these documents,
8 not what Dr. Freidenfelds thinks about them, not
9 what Dr. Plunkett thinks about them, the evidence
10 that comes to you in the documents themselves. And
11 the evidence show what happened with that
12 discussion.

13 The research workers do not think the talc
14 particles are in any way related to the etiology of
15 cancer, to causing cancer, and how we worked with
16 them to get samples so we could test them. This is
17 the evidence we have of what went on, and there was
18 no evidence when this study came out that showed
19 talc in normal tissue, in malignant tissue, that
20 showed a visit with the researchers, there is no
21 evidence that Johnson & Johnson thought or believed
22 this was in any way related to the cause of cancer.
23 The highest amount of talc was actually found in
24 normal tissue.

25 We saw what Johnson & Johnson was doing around

1 this time period, how there were documents after
2 documents of literature reviews where Johnson &
3 Johnson typed up and reviewed all of the studies
4 that were in the public domain at the time, and
5 then you saw documents that we packaged it up and
6 sent it to the FDA. Johnson & Johnson was engaging
7 in the scientific process as early as these
8 documents go back.

9 You saw that Johnson & Johnson formed a talc
10 advisory committee made up of scientists and
11 doctors that met regularly to review this data, and
12 that is what you would expect, that a company stay
13 on top of the medical literature and respond to
14 these things as they occur in the literature.
15 Dr. Cramer published his first study in 1982, but
16 what happened was it was reviewed by the United
17 States Government. You heard that the Department
18 of Health and Human Services has a whole report on
19 Dr. Cramer's study.

20 They brought you Dr. Cramer's study as a
21 reason that Johnson & Johnson should have been on
22 notice that something was wrong with Johnson's Baby
23 Powder, and our government said the results were
24 completely unreliable. This document explained the

25 multiple problems with Dr. Cramer's study;

↑

3997

1 misinterpreted statistically, uncorrected for bias,
2 and strongly contradicted by another study.

3 You heard about the FDA's continued evaluation
4 of scientific data related to this issue. And what
5 happened just a few years after Dr. Cramer is that
6 a citizen wrote to the FDA and asked for an
7 asbestos warning on Johnson's Baby Powder.

8 What you heard about is the three years that
9 the FDA spent reviewing that petition, examining
10 the data on cosmetic talc, on the literature, and
11 one of the things the FDA did was this: The FDA
12 conducted a worst case estimate. It assumed if
13 there was .1 percent asbestos in cosmetic talc,
14 would that be a health hazard?

15 And these documents say the FDA was confident
16 that there was not, but it wanted to err on the
17 side of caution and assume for this worst case
18 estimate exposure there was .1 percent asbestos.
19 And when the FDA did that, they said there is no
20 health hazard because exposure at this level would

21 be less than exposure from background asbestos in
22 the environment in 1986, and so they denied this
23 request for a petition -- for a warning in 1986.

24 But what you heard about is that Johnson &
25 Johnson did not depend on what the FDA said about

↑

3998

1 whether or not a warning was needed. If you
2 remember, Dr. Kuffner testified about another
3 citizens' petition that was sent to the FDA in the
4 1980s. And what it said is we see reports in the
5 literature about kids occasionally grabbing the
6 bottle during a diaper change and unintentionally
7 shaking it over their face.

8 And the request said we don't think this
9 happens a lot, but we want you, FDA, to require a
10 warning. And the FDA said, "This is really just a
11 situation where kids aren't being looked after. We
12 don't think this requires a warning, we are going
13 to deny your request. We think parents can keep
14 this under control."

15 But what Dr. Kuffner told you is that that was
16 not J&J's evaluation of the science. That was not

17 J&J evaluation of how to keep this product safely
18 used by consumers. And so even though the FDA in
19 the 1980s said no warning is required, Johnson &
20 Johnson put a warning on the product. And you
21 heard from Dr. Kuffner, we changed the lid. We
22 restricted the flow from the top of the bottle so
23 that if a kid did get ahold of it, they couldn't
24 shake too much of it out. Dr. Kuffner told you
25 that Johnson & Johnson, people like him, make

↑

3999

1 independent evaluations of the science to make sure
2 that the products we are selling are safe and are
3 appropriate for use by consumers.

4 You heard about Johnson & Johnson
5 participation in the 1994 talc symposium. This is
6 another point in time where scientists came
7 together to discuss issues of talc safety. And
8 it's important as you think about the allegations
9 in this case that somehow we knew something that
10 everybody else didn't know.

11 All of those studies that were on this chart
12 were part of this two-day public meeting. The

13 first day was devoted to inhalation and the second
14 day was devoted to issues of ovarian cancer
15 epidemiology. And 100 people attended. It was a
16 program that was made public.

17 We were there. Scientists from the FDA were
18 there. Universities were there. All of this
19 scientific data including the Henderson article.
20 The Henderson article that had found talc in normal
21 ovaries, in malignant ovaries, that was part of
22 this symposium. Some of those case-control studies
23 that purported to find a risk, including
24 Dr. Cramer's 1982 study, that was part of this
25 meeting.

↑

4000

1 All of these scientific developments came
2 together with researchers leading in the field and
3 they were discussed for two days in the public, and
4 you saw the report of what the conclusions were.
5 You saw -- and we put parts of it up with various
6 witnesses -- that the conclusion of this two-day
7 scientific symposium was that talc had proven to be
8 among the safest of all consumer products.

9 Johnson & Johnson participated in this.

10 Johnson & Johnson had people at the meeting. If
11 you think about whether Johnson & Johnson was
12 acting reasonable, we participated in a meeting
13 with the government where the conclusion was we
14 were selling the safest of all consumer products.

15 You heard about the FDA's continued oversight
16 in this area. You heard about testing the FDA did
17 back in the 1970s, but also again in 2009 and 2010,
18 when they went out in Washington, D.C. and took
19 products off the shelf and tested it, including
20 ours. Johnson's Baby Powder that was tested at
21 this time had no asbestos.

22 And then they took material from the mine.
23 They took raw talc from our supplier and tested
24 that too, and it also was free of asbestos.

25 We spoke about the 2014 request for a warning,

↑

4001

1 request for an ovarian cancer warning on baby
2 powder. And this is where the FDA interpreted its
3 own regulation. You remember when Dr. Plunkett was
4 here, she pointed this regulation out to you -- and

5 I think it's going to be in the jury
6 instructions -- and we absolutely agree: This is
7 the operative regulation.

8 Current regulations state that cosmetic
9 products shall bear a warning statement whenever
10 necessary or appropriate to prevent a health hazard
11 that may be associated with the product. And I
12 would respectfully submit to you that FDA knows
13 better than Dr. Plunkett how to interpret this
14 regulation because they interpreted their own
15 regulation as it relates to the very issue before
16 you-all. Someone came to them and said what these
17 plaintiff's lawyers are suggesting: Put an ovarian
18 cancer warning on the product.

19 The FDA said this is the regulation. We do it
20 when it's necessary or appropriate to prevent a
21 health hazard. And after the FDA looked at
22 epidemiology, toxicology, chemistry, a multipage
23 report that it analyzed for multiple years, it said
24 no. It said this is not appropriate to prevent a
25 health hazard because the science doesn't support

1 that it causes a health hazard. The FDA knows how
2 to interpret its own regulation and the FDA denied
3 this warning in 2014.

4 You heard a lot about Health Canada in this
5 case, a draft screening assessment that came out of
6 Health Canada in 2018. And there is no question
7 that it is entirely in conflict with all of the
8 U.S. public health authorities, with the FDA, with
9 the NCI, with the CDC. They brought you no other
10 public health authority than one outside of our own
11 country, and that alone should have you guys
12 shaking your head.

13 Where are the United States public health
14 authorities? Why are we going all the way to
15 Canada to get this assessment? And you saw what
16 this assessment is based on. You saw this article,
17 the Taher article, that was supported by Health
18 Canada.

19 In connection with putting out this Health
20 Canada report, they commissioned this study and it
21 was one of those meta-analyses that several of the
22 epidemiologists spoke about. And this is what is
23 most telling about the Health Canada report: What
24 they had to do to get this meta-analysis published
25 is they had to evaluate the quality of the data.

↑

4003

1 And that's all of those case-control studies we've
2 been talking about, right?

3 Everything on that list that they say to the
4 right of one shows a risk, that's these studies.
5 Every single one of them is in this Taher paper.
6 And they had to evaluate whether or not those
7 results were reliable by something called a GRADE
8 working analysis. What they did and what they
9 concluded was the certainty of the evidence is very
10 low.

11 It is the lowest grade you can get for this
12 system. And what it means is that we have very
13 little confidence that the effect estimate is the
14 true effect. The true effect is likely to be
15 substantially different.

16 The actual data that Health Canada relied on
17 does not support their conclusions. The actual
18 paper says this data likely means something other
19 than what it says it means.

20 Then you heard from Dr. Saenz that Health
21 Canada was held up as being a neutral or an

22 independent report. And you heard about all sorts
23 of expert reports that are cited throughout it.
24 Who has ever heard of a public health authority
25 that relies on information from litigation?

↑

4004

1 And Dr. Saenz pointed specifically to this
2 paragraph where it talks about a specific order of
3 events by which perineal talc exposure could lead
4 to ovarian cancer has not been established, but
5 several publications support this hypothesis. And
6 then she told you each one of these publications
7 was authored by an expert witness while they were
8 performing as an expert witness in litigation.

9 This is not a situation where they wrote these
10 beforehand and then became an expert. These folks
11 were being paid to testify in lawsuits like this
12 one, and it is solely their work that supported the
13 entire biological plausibility analysis of Health
14 Canada. And that's why Dr. Saenz told you this is
15 not a neutral publication and it is not consistent
16 with the National Cancer Institute.

17 You heard about the 2019 findings from the FDA

18 and you heard -- and these 2019 findings are sub,
19 subtrace, and you heard about how they were
20 outliers. Dr. Sanchez came in and explained he had
21 tested talc from China for almost a decade by the
22 time this finding happened, and he had never -- not
23 once -- seen any finding of chrysotile.

24 You heard about the FDA's own testing that had
25 happened the month before that showed no asbestos,

↑

4005

1 no asbestos, no asbestos. Even in the batch that
2 was tested in the fall of 2019, you heard the first
3 sample had no asbestos. And then you heard about
4 these two outlier samples of .00002 percent. And
5 the very first thing that Johnson & Johnson did
6 when this happened, Dr. Kuffner conducted a health
7 hazard evaluation.

8 Before anybody did the 155 tests to find out
9 if it was contamination to get to the bottom of
10 what's going on, the first thing the company did is
11 figure out whether or not this presented a human
12 health risk. And when you look at the sub, sub,
13 subtrace level of these handful of fibers, it is

14 clear it does not.

15 You see that it is 5,000 times lower than what
16 the FDA, decades ago, determined was not a health
17 hazard. And Dr. Kuffner's own evaluation that's in
18 evidence shows you that it's two million times
19 lower than an occupational talc exposure.

20 And even so, Johnson & Johnson, within 48
21 hours of learning this, recalled that lot. And you
22 heard, and what was even curious, is that the FDA
23 knew about this for 39 days before they told us.
24 This is being presented to you-all as this
25 explosive piece of evidence that there's asbestos

↑

4006

1 in Johnson's Baby Powder, and the FDA didn't even
2 tell us about it until over a month after they
3 learned about it?

4 That doesn't make any sense. If this really
5 was a true finding that really presented human
6 health, the FDA would have told us about it before
7 waiting 39 days.

8 You heard about the extensive testing that
9 Johnson & Johnson did to confirm it wasn't coming

10 from the product. We needed to do 23 tests to be
11 99 percent confident that this wasn't coming from
12 the product. And you heard -- and Dr. Kuffner and
13 Dr. Sanchez went through it -- the 155 tests that
14 we did.

15 And somebody, I think a couple of you folks
16 asked a really good question about this testing:
17 Is there any evidence that Marilyn Seskin used one
18 of these recalled bottles? And there was not a
19 shred of evidence of that. In fact, Dr. Seskin,
20 unfortunately, passed away May of 2019, and this
21 didn't take place until October of 2019.

22 So your good questions about timing, there is
23 no evidence of that in this case. There is not a
24 single evidence even that any of this talc would
25 have been on the shelves in 2016 when Dr. Seskin

↑

4007

1 was, unfortunately, diagnosed with her cancer.

2 You heard from Dr. Kuffner about the efforts
3 the company made when Health Canada came out.
4 Dr. Kuffner had recently come into his position as
5 chief medical officer, and you heard about the

6 comprehensive review that Dr. Kuffner commissioned.
7 And I would suggest to you-all, please look at it.
8 It's P2527 -- this is in evidence -- and it goes
9 through comprehensively all of the scientific
10 support for this conclusion; toxicology studies,
11 epidemiology studies, decades of research and
12 public health authorities that support the
13 conclusion that the overwhelming body of evidence
14 does not support that talc has any association with
15 lung or ovarian cancer.

16 And you heard from Dr. Kuffner that the buck
17 stopped with him from 2017 until 2020. He was the
18 person responsible for talc safety. And what he
19 told you is that if we had determined based on
20 science that this product caused cancer, we
21 wouldn't sell it. We don't put cancer warnings on
22 consumer products like baby powder. We don't sell
23 that. If the science supported a risk with this
24 product, we would take it off the market before we
25 warned consumers that there might be a cancer risk.

↑

4008

1 Dr. Kuffner told you that would have been his

2 call. What was not his call was to discontinue the
3 product in 2020, and you saw why that happened.
4 Misinformation about the product, particularly
5 during COVID, a business decision was made not to
6 sell it. He told you that he had nothing to do
7 with that, and today, the company stands by the
8 safety of the product.

9 Dr. Kuffner's job is to protect patient
10 safety. His number one focus is to make sure that
11 when he makes the call to keep a product on the
12 market, to put a warning on a product or not, it is
13 the right call and it's based on the science. And
14 that's why when he came into the position, he told
15 you, in 2017, he commissioned the comprehensive
16 review to double and triple and quadruple check
17 that what decades of what scientists had been
18 evaluating was the truth, was accurate, continued
19 to be right.

20 Dr. Kuffner treats patients today.
21 Dr. Kuffner is a medical doctor who has devoted his
22 life to caring for other people, and here in this
23 courtroom, he has been accused of hiding asbestos
24 in a baby product, and that is not supported by the
25 evidence and not supported by the documents and is

↑

4009

1 certainly not supported by the scientific articles.

2 THE COURT: Six minutes remaining.

3 MS. BROWN: Thank you very much, Your Honor.

4 Somebody also asked a terrific question about
5 these studies. So these were the miner and miller
6 studies. In our talc mines in Vermont and in
7 Italy, workers have been followed for decades.
8 They are men because of the time period and the
9 nature of these jobs.

10 And someone asked a great question: Well, why
11 do we care about men if these folks weren't using
12 this for feminine hygiene?

13 Terrific question. Here is the answer:
14 Mesothelioma is associated with asbestos exposure,
15 nobody disputes that. It is the cancer of the
16 lining of the lung that is unquestionably
17 associated with asbestos exposure.

18 These are the workers that had the highest and
19 the greatest exposure to our product. If Johnson's
20 Baby Powder truly had asbestos in it, these people
21 with the greatest amount of exposure would show
22 asbestos-related diseases. You would see it in

23 these folks.

24 And in all of the studies that have been done
25 in the Italian cosmetic miners and millers, our

↑

4010

1 talc, there is no evidence of an increased risk of
2 mesothelioma, and the same is true in the Vermont
3 talc mines. If this product had asbestos, you
4 would see it in these studies.

5 Dr. Sanchez was here, the only geologist in
6 this case. Plaintiffs -- this is a case about
7 geology issues from mines all over the world, and
8 plaintiffs didn't bring you a single geologist.
9 But Dr. Sanchez was here and explained to you --
10 and Dr. Rigler agreed -- amphibole does not mean
11 asbestos.

12 So when you were shown documents like this and
13 it was suggested to you this was an asbestos
14 finding, that is not right and that is not fair.
15 And we showed you the other parts of these Battelle
16 documents where Battelle concludes this is high
17 purity talc. This talc is of high quality. If
18 tremolite meant asbestos, Battelle would not have

19 written that.

20 Dr. Sanchez talked about the actual confusion
21 that's going on in this litigation, how
22 non-asbestiform tremolite is being crushed and
23 plaintiff's experts are claiming it is asbestos
24 because it looks like the shape of a fiber. And
25 Dr. Rigler testified exactly to that and we have

↑

4011

1 the transcripts right here. He said yes, no matter
2 what I look at, if it measures the shape of a
3 fiber, I'm going to call it asbestos. That's
4 what's going on here.

5 Dr. Sanchez is the only one who has been to
6 the mines. He is the only geologist who explains
7 how asbestos forms and how it can't even form in
8 these areas of the mine where folks are mining for
9 cosmetic talc.

10 He spoke to you about his confidence that
11 Johnson's Baby Powder doesn't have asbestos, not
12 just because he went to the mines, not just because
13 of the geological formation, but because he has
14 tested sample and sample himself. Dr. Rigler

15 hasn't done any of the testing himself.

16 Dr. Sanchez tested each and every one of these
17 bottles, he has looked at all of these results and
18 concluded that Johnson's Baby Powder does not have
19 asbestos.

20 What we heard from Dr. Freidenfelds is that it
21 must be in there and we must have been covering it
22 up for a very, very long time. Hundreds of doctors
23 and scientists over multiple decades at Johnson &
24 Johnson must have been hiding this fact. But I ask
25 you-all, when you go back into this jury room, look

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4012

1 at the documents that came in. Look at what
2 Dr. Freidenfelds was or was not relying on.
3 Because Dr. Freidenfelds ultimately admitted
4 2,000,000 pages of documents, and she looked at
5 .1 percent.

6 When you are seriously evaluating the claims
7 that are being made in this case that we sold a
8 product that caused cancer, look at the documents,
9 look at the evidence, because they do not support
10 decades and decades of people lying at Johnson &

11 Johnson and hiding asbestos.

12 We asked Dr. Freidenfelds throughout her
13 examination: Did you see this? Were you aware of
14 this? Do you know about the Dr. Pooley study? And
15 time and time again, she admitted she had not seen
16 the documents.

17 The documents do not support this claim of a
18 multi-decade conspiracy that would have involved
19 people inside Johnson & Johnson, outside Johnson &
20 Johnson, at the FDA, at all sorts of different
21 universities.

22 THE COURT: Minute and 30 seconds remaining.

23 MS. BROWN: Thank you, Your Honor.

24 This is what the evidence supports, miner and
25 millers studies that show no asbestos-related

↑

4013

1 disease. Routine testing by independent
2 laboratories, by the government, by Battelle, by
3 McCrone that repeatedly show no asbestos.

4 Dr. Freidenfelds brought you two documents.
5 She claimed they both had asbestos, and neither one
6 of them did. She didn't know about the retest on

7 one and she didn't know that the other one was talc
8 we never used.

9 Look at the documents when you are evaluating
10 this. Plaintiffs have the burden of proving to you
11 that had Dr. Seskin never used talc, she would
12 never have gotten cancer, and when you look at the
13 verdict form, this is the only question I would
14 submit to you you have to answer, because if you
15 find no to this, you stop.

16 If you cannot find that they have brought you
17 credible evidence that had Marilyn Seskin never
18 used talcum powder, she never would have gotten
19 cancer, you put no, and you stop. They have not
20 brought you that evidence.

21 Their own experts have identified for you
22 things like age and nulliparity that could have
23 caused her cancer had she never used talc. They
24 have not met this burden of no talc, no cancer
25 because they can't, because that is not the science

↑

4014

1 of ovarian cancer.

2 THE COURT: Thank you.

3 MS. BROWN: Thank you very much.

4 THE COURT: You have 20 minutes left.

5 MR. OLIVER: Good afternoon, ladies and
6 gentlemen. I am going to try to do my very best
7 not use my 20 minutes, but I want to start with
8 something that defense counsel started with. They
9 have a board up there and I was kind of shocked
10 they put the board up here, and they only gave you
11 half of instruction number 8, and that tells you
12 everything that you need to know about this
13 company, Johnson & Johnson, and the lawyers that
14 work for them.

15 MS. BROWN: Objection Your Honor.

16 THE COURT: Sustained.

17 MR. OLIVER: Even in this courtroom, they
18 can't tell you the truth about the instructions.
19 They gave you half the story. Half the story.
20 That's all you need to know.

21 Now, I can't go over everything that counsel
22 said in 20 minutes, but I'm going to try to go
23 methodically through it and tell you some things
24 that you should know.

25 They put a note up from Marilyn and I believe

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4015

1 defense counsel described that as a note from her
2 doctor. That note is not in evidence and it's not
3 a note from her doctor. It is her handwritten
4 note -- I believe Bob wrote it -- and it was a
5 question for her doctor.

6 MS. BROWN: Objection, Your Honor. It's not
7 in evidence.

8 THE COURT: Ladies and gentlemen, rely upon
9 your own independent and collective recollection as
10 to what the testimony was.

11 MR. OLIVER: The testimony that is in evidence
12 was that that was a question to her doctor written
13 by them. Counsel misrepresented what that was.

14 The statements about Health Canada. Health
15 Canada had all of the information. They didn't
16 just rely on plaintiff's lawyers' study. That's
17 ridiculous. They showed you our chart, right?
18 They showed you the chart with the risk ratio,
19 except they showed you a chart that wasn't the one
20 we introduced into this courtroom.

21 So Dr. Kuffner and Dr. Freidenfelds.
22 Dr. Freidenfelds came in here and told you she
23 doesn't do this for a living, right? This was the

24 first time she testified. The first time she'd
25 ever been deposed was for this case. She has no

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4016

1 dog in this fight. And I think we could all agree,
2 she was completely sincere.

3 Yes, she told you that she had access to a
4 database with millions and millions of documents,
5 and it's not possible toll look at all those
6 documents. But what I find so telling about
7 defense counsel's attack on her is that when I
8 asked Dr. Kuffner, okay, you work for Johnson &
9 Johnson, I get it, you're going to come tell us
10 about these documents, you know what he said?

11 He didn't even review the documents that
12 Dr. Freidenfelds showed you. He didn't even review
13 the list. He had access to the list, he knew she
14 had a list, he didn't do that.

15 Instead, he read her transcript testimony,
16 talked to the lawyers for three hours, and came in
17 here and told you the same story that Johnson &
18 Johnson has been telling to everybody for years.
19 And they keep characterizing this as if I'm saying

20 that the FDA was in on this, that Harvard was in on
21 this. That's not what I'm saying, and I think you
22 understand what we're saying. They were hiding all
23 this information from them too.

24 Regulators can't make accurate and thoughtful
25 decisions if the companies that they regulate don't

↑

4017

1 honestly participate in the process. And a great
2 example of that is the 1994 FDA conference; I
3 believe that document is actually in evidence. And
4 if you go back and look at the list of participants
5 on that conference, it's I think out of the 100
6 participants about 50 of them were industry, right?

7 They were industry people related to the talc
8 industry most of them -- not most of the 100, but a
9 lot of them were from Johnson & Johnson, a lot of
10 them were from the mining companies. These were
11 people -- it was an industry-sponsored conference
12 and Dr. Freidenfelds talked about that.

13 She said the problem -- she said, "I didn't
14 need to read the transcript. The problem was not
15 that FDA was there, it's that this was an

16 industry-funded thing to try to keep people from
17 understanding the full truth about the evidence on
18 talc."

19 Defense counsel talked a lot about Marilyn
20 Seskin's risk factors, but again, there was some
21 missing information. Defendants have relied
22 heavily on the Society of American Gynecological
23 Oncologists, but we showed you evidence during the
24 cross-examination of Dr. Saenz that the Society of
25 Gynecological Oncologists has stated that when you

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4018

1 use progesterone with your hormone therapy, it's
2 not a risk factor for ovarian cancer. And it was
3 undisputed that that was exactly how Marilyn Seskin
4 used it.

5 By the way, on that subject. When you talk
6 about risk factors, hormone replacement therapy,
7 when not used appropriately with progesterone is in
8 fact a risk factor. But the association in the
9 statistical literature is 1.3. It's the same as
10 talc. And the same thing is true for -- this was
11 in the examination of, I believe, Dr. Saenz. The

12 same thing is true for something like secondhand
13 smoke. It's a 1.3 relative risk.

14 Even though we know secondhand smoke is
15 related to cancer, it has a relatively small
16 relative risk. Why is it if you look at the list
17 of risk factors on all these regulatory agencies'
18 statements, why is talc the only one that's not on
19 there?

20 Well, if you go through the risk factors, the
21 only one that has a \$377 billion industry behind it
22 is talc. Everything else is undisputed because
23 it's age, endometriosis. There is no endometriosis
24 association that goes out and tries to keep
25 endometriosis off of risk factor lists.

↑

4019

1 But for 30 or 40 years, Johnson & Johnson has
2 been confounding the scientific literature on this.
3 And that's exactly what happened here. That's why
4 it hasn't gotten out.

5 You remember what Dr. Ness said about these
6 studies and recall bias, and somebody asked a great
7 question about it being a sticky habit. She

8 testified to that. They want you to believe that
9 recall bias has affected all of these 38 out of 40
10 studies. It doesn't make sense. These studies
11 have taken place in different decades over 40 years
12 with different researchers and they keep coming out
13 with basically the same thing. And that's why we
14 know it's real.

15 They want to know why we didn't test the
16 bottles. You are going to have the bottles back
17 there. You have two bottles, and I don't know how
18 much is left in the talc bottles, it's maybe a
19 quarter of the bottle, you'll have to look. Don't
20 take it out of the bag, but you can feel how much
21 is in it.

22 We didn't test it because it doesn't matter
23 what we do. The FDA tested it and said there was
24 asbestos in it and Johnson & Johnson said that's
25 not true. McCrone tested it back in 1988, and then

↑

4020

1 all of a sudden, McCrone sent them a letter and
2 said, well, we didn't find it anymore. The people
3 at Mount Sinai tested it found chrysotile asbestos,

4 and they didn't withdraw that finding, and Johnson
5 & Johnson said it's not there.

6 It doesn't matter what I do; when I find it,
7 they are going to say it's not there. We already
8 tested -- I don't remember how many bottles
9 Dr. Rigler tested. We tested them, and it was
10 70-something percent finding. They said it's
11 contamination. Dr. Felix came in and said the talc
12 particles in Marilyn's tissue was contamination.

13 Everything they find, they have an excuse for.
14 It's always the blame game. It's the
15 air-conditioner, it's the contaminated tissue from
16 the lab, even though I don't know which lab, or why
17 it happened, or what happened with any of that,
18 right? That's the kind of testimony they come in
19 to this courtroom and they offer. And it's simply
20 not credible.

21 At the end of the day, this boils down to the
22 following thing: Dr. Kuffner came in here and said
23 every year that Marilyn had cancer, he got a bonus,
24 but he told you his job was to protect patients.
25 At the end of the day, they chose wealth over women

1 customers. That's absolutely what they did. It's
2 absolutely clear, and it's why I'm asking you to
3 award us a verdict in this case and punish them.

4 Thank you, ladies and gentlemen of the jury.

5 THE COURT: Ladies and gentlemen, I'm going to
6 give you some instructions. If you could read
7 along with me, don't read ahead, please. Rod, if
8 you could take the board down.

9 All right. Ladies and gentlemen, we are on
10 page 2.

11 Members of the jury, you have now heard and
12 received all the evidence in the case. I am now
13 going to tell you about the rules of law that you
14 must use in reaching your verdict. When I'm done
15 telling you about the rules of law that you must
16 use in reaching your verdict, you will then retire
17 to the jury room and begin your deliberations.

18 In deciding this case, it is your duty as
19 jurors -- I'm on page 3 now. In deciding this
20 case, it is your duty as jurors to decide the
21 issues and only those issues that I submit for your
22 determination. You must come to an agreement about
23 your verdict.

24 The evidence in this case consists of the

25 sworn testimony of the witnesses, all exhibits

↑

4022

1 received in evidence, and all facts that were
2 admitted or agreed to by the parties. In reaching
3 your verdict, you must think about and weigh the
4 testimony and any documents, photographs, or other
5 material that has been received in evidence. You
6 may also consider any facts that were admitted or
7 agreed to by the lawyers.

8 Your job is to determine what the facts are.
9 You may use reason and common sense to reach your
10 conclusions. You may draw reasonable inferences
11 from the evidence, but you should not guess about
12 things that were not covered here, and you must
13 always apply the law as I have explained it to you.

14 You can turn the page. The fact that the
15 defendants are corporations must not prejudice you
16 in any of your deliberations or in your verdict.
17 You may not discriminate between corporations and
18 natural individuals. Both are persons in the eyes
19 of the law and both are entitled to the same fair
20 and impartial consideration under the same legal

21 standard.

22 Page 5. If the greater weight of the evidence
23 does not support Mr. Sugarman on a claim or claims,
24 then your verdict should be for the defendant or
25 defendants on the claim or claims and you should

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4023

1 follow the instructions on the verdict form about
2 how to proceed next. If the greater weight of the
3 evidence supports Mr. Sugarman on a claim or
4 claims, then your verdict should be for
5 Mr. Sugarman on that claim or claims, and you
6 should follow the instructions on the verdict form
7 about how to proceed next.

8 Greater weight of the evidence means the more
9 persuasive and convincing force and effect of the
10 entire evidence in the case. I'm now on page 7.

11 Let me speak briefly about witnesses. In
12 evaluating the believability of any witness and the
13 weight you will give the testimony of any witness,
14 you may properly consider the demeanor of the
15 witness while testifying, the frankness or lack of
16 frankness of the witness, the intelligence of the

17 witness, any interest the witness may have in the
18 outcome of the case, the means and opportunity the
19 witness had to know the facts about which the
20 witness testified, the ability of the witness to
21 remember matters about which the witness testified,
22 and the reasonableness of the testimony of the
23 witness considered in the light of all the evidence
24 in the case, and in the light of your own
25 experience and common sense.

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4024

1 You have heard opinion testimonies on certain
2 technical subjects from persons referred to as
3 expert witnesses. You may accept such opinion
4 testimony, reject it, or give it the weight you
5 think it deserves considering the knowledge, skill,
6 experience, training, or education of the witness,
7 the reasons given by the witness for the opinion
8 expressed, and all other evidence in the case.

9 In your deliberations you will consider and
10 decide several distinct claims. One, strict
11 liability for product defect and failure to warn.
12 Two, negligent design and failure to warn. Three,

13 negligent misrepresentation. Four, fraudulent
14 misrepresentation. And five, conspiracy to conceal
15 information.

16 Although these claims have been tried
17 together, each is separate from the other and each
18 party is entitled to have you separately consider
19 each claim as it affects that party. Therefore, in
20 your deliberations, you should consider the
21 evidence as it relates to each claim separately as
22 you would had each claim been tried before you
23 separately.

24 A defect in a product -- I'm on page 9. A
25 defect in a product. A party's negligence or

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4025

1 misrepresentation of a material fact is a legal
2 cause of injury if it directly, and in natural and
3 continuous sequence, produces or contributes
4 substantially to producing such injury so that it
5 can reasonably be said that but for the defect, the
6 negligence or misrepresentation, the injury would
7 not have occurred.

8 In order to be regarded as a legal cause of

9 injury, a defect in a product or the negligence of
10 any defendant need not be the only cause. A defect
11 in a product or the negligence of any defendant may
12 be a legal cause of injury even though it operates
13 in combination with the act of another, or some
14 natural cause, or some other cause in the defect
15 contributes substantially to producing such injury.

16 Page 10. The issues you must decide on the
17 plaintiff's strict liability claims against the
18 defendants are, one, whether talc-based Johnson's
19 Baby Powder was defective, and if so, two, whether
20 that defect was a legal cause of the cancer and
21 death of Marilyn Seskin.

22 Page 11. A product is defective because of a
23 design defect if it is in a condition unreasonably
24 dangerous to the user, and the product is expected
25 to and does reach the user without substantial



4026

1 change affecting that condition. A product is
2 unreasonably dangerous because of a design if the
3 product fails to perform as safely as an ordinary
4 consumer would expect when used as intended, or

5 when is used in a manner reasonably foreseeable by
6 the manufacturer, or the risk of danger in the
7 design outweighs the benefits.

8 In deciding whether talc-based Johnson's Baby
9 Powder was defective because of a design defect,
10 you shall consider the state of the art of
11 scientific and technical knowledge and other
12 circumstances that existed at the time of the
13 manufacture of talc-based Johnson's Baby Powder,
14 not at the time of the injury. If you determine
15 that the talc-based Johnson's Baby Powder complied
16 with federal or state code, statutes, rules,
17 regulations or standards that were designed to
18 prevent the type of harm that allegedly occurred at
19 the time it was sold, then there is a rebuttable
20 presumption that the talc-based Johnson's Baby
21 Powder was not defective or unreasonably dangerous.

22 If you determine that the talc-based Johnson's
23 Baby Powder did not comply with federal or state
24 codes, statutes, rules, regulations or standards
25 that were designed to prevent the type of harm that

1 allegedly occurred at the time it was sold, then
2 there is a rebuttable presumption that talc-based
3 Johnson's Baby Powder is defective or unreasonably
4 dangerous.

5 For example, 21 CFR Section 740.1 provides,
6 "The label of a cosmetic product shall bear a
7 warning statement whenever necessary or appropriate
8 to prevent a health hazard that may be associated
9 with the product."

10 Page 12. A product is defective if
11 unreasonably dangerous, even if the seller has
12 exercised all possible care in the preparation and
13 sale of the product, or if the risk of danger in
14 the design outweighs the benefit.

15 Page 13. A product is defective when the
16 foreseeable risk of harm from the product could
17 have been reduced or avoided by providing
18 reasonable instructions or warnings, and the
19 failure to provide those instructions or warnings
20 makes the product unreasonably dangerous. A
21 product is defective if unreasonably dangerous even
22 if the seller has exercised all possible care in
23 the preparation and sale of the product.

24 Page 14. The issues you must decide on the
25 plaintiff's negligence claim against Johnson &

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4028

1 Johnson are whether Johnson & Johnson was negligent
2 in the design of talc-based Johnson's Baby Powder,
3 or in failing to provide warnings about Johnson
4 talc-based Johnson's Baby Powder, and if so,
5 whether that was a legal cause of Marilyn Seskin's
6 cancer and death.

7 The issue you must decide on the plaintiff's
8 negligence claim against LTL Management, LLC are
9 whether LTL Management, LLC was negligent in the
10 design of talc-based Johnson's Baby Powder, or in
11 failing to provide warnings, and if so, whether
12 that was a legal cause of Marilyn Seskin's cancer
13 and death.

14 Page 15. Negligence is the failure to use
15 reasonable care, which is the care that a
16 reasonably careful manufacturer or seller would use
17 under like circumstances. Negligence is doing
18 thing that a reasonably careful manufacturer or
19 seller would not do under like circumstances, or
20 failing to do something that a reasonably careful
21 manufacturer would do under like circumstances.

22 Page 16. Reasonable care on the part of the
23 defendant requires that the defendant give
24 appropriate warnings about particular risks of
25 talc-based Johnson's Baby Powder which defendants

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4029

1 knew or should have known are involved in the
2 reasonably foreseeable use of their product.

3 Page 17. The issues for you to decide on the
4 plaintiff's claim for negligent misrepresentation
5 against Johnson & Johnson are, one, whether Johnson
6 & Johnson made a statement or statements concerning
7 a material fact that it believed to be true, but
8 which was in fact, false. Two, whether Johnson &
9 Johnson was negligent in making the statement
10 because it should have known the statement was
11 false. Three, whether in making the statement,
12 Johnson & Johnson intended or expected that another
13 would rely on the statement. Four, whether Marilyn
14 Seskin justifiably relied on the false statement,
15 and if so, five, whether that justifiable reliance
16 on the false statement was a legal cause of Marilyn
17 Seskin's cancer.

18 The issues for you to decide on plaintiff's
19 claim for negligent misrepresentation against LTL
20 Management are, one, whether LTL Management, LLC
21 made a statement or statements concerning a
22 material fact that it believed to be true, but
23 which was, in fact, false; whether LTL Management,
24 LLC was negligent in making the statement because
25 it should have known that the statement was false.

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4030

1 Three, whether in making the statement, LTL
2 Management, LLC intended or expected that another
3 would rely on the statement. Four, whether Marilyn
4 Seskin justifiably relied on the false statement,
5 and if so, five, whether the justifiable reliance
6 on the false statement was a legal cause of Marilyn
7 Seskin's cancer.

8 Page 18. The issues for you to decide on the
9 plaintiff's claim for fraudulent misrepresentation
10 against Johnson & Johnson are, one, whether Johnson
11 & Johnson intentionally made a false statement or
12 statements concerning a material fact. Two,
13 whether Johnson & Johnson knew that the statement

14 was false when it made it, or made the statement
15 knowing it did not know whether it was true or
16 false. Three, whether Johnson & Johnson intended
17 that others would rely on the false statement.
18 Four, whether Marilyn Seskin relied on the false
19 statement, and if so, whether the reliance on the
20 false statement was a legal cause of Marilyn
21 Seskin's cancer.

22 The issue for you to decide on whether
23 plaintiff's claim for fraudulent misrepresentation
24 against LTL Management, LLC was proven are, one,
25 whether LTL Management, LLC intentionally made a

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4031

1 false statement or statements considering
2 concerning a material fact. Two, whether LTL
3 Management knew that the statement was false when
4 it made it, or made the statement knowing it did
5 not know whether it was true or false. Three,
6 whether LTL Management, LLC intended that another
7 would rely on the false statement. Four, whether
8 Marilyn Seskin relied on the false statement, and
9 if so, whether the reliance on the false statement

10 was a legal cause of Marilyn Seskin's cancer.

11 Page 19. On these claims for fraudulent
12 misrepresentation, Marilyn Seskin may rely on a
13 false statement, even though its falsity could have
14 been discovered if Marilyn Seskin had made an
15 investigation, but not if Marilyn Seskin knew it
16 was false or its falsity was obviously obvious to
17 her.

18 Page 20. The issue for you to decide on
19 plaintiff's claim for conspiracy to fraudulently
20 conceal against Johnson & Johnson are -- I'm sorry,
21 I'll just read it -- one, whether Johnson & Johnson
22 intentionally made a statement or statements that
23 concealed or committed -- or omitted -- I'll start
24 over.

25 One, whether Johnson & Johnson intentionally

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4032

1 made a statement or statements that concealed or
2 omitted a material fact concerning the safety of
3 talc-based Johnson's Baby Powder. Two, whether
4 that statement that concealed or omitted a material
5 fact that was in furtherance of an agreement with

6 another person or to withhold information
7 concerning the safety of talc-based Johnson's Baby
8 Powder. Three, whether Johnson & Johnson knew that
9 the statement concealed or omitted a material fact
10 when it made it or made the statement. Four,
11 whether Johnson & Johnson intended that another
12 would rely upon the statement concealing or
13 omitting a material fact. Five whether Marilyn
14 Seskin relied on the statement concealing or
15 omitting a material fact, and if so, six, whether
16 the reliance on the statement concealing or
17 omitting a material fact was a legal cause of
18 Marilyn Seskin's cancer.

19 The issue for you to decide on plaintiff's
20 claim for fraudulent misrepresentation against LTL
21 Management are, one, whether LTL Management, LLC
22 intentionally made a statement or statements that
23 concealed or omitted a material fact concerning the
24 safety of talc-based Johnson's Baby Powder.

25 Page 21. Two, whether that statement that

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4033

1 concealed or omitted a material fact was in

2 furtherance of an agreement with another person to
3 withhold information concerning the safety of
4 talc-based Johnson's Baby Powder. Three, whether
5 LTL Management knew the statement concealed or
6 omitted a material fact when it made it or made the
7 statement. Four, whether LTL Management intended
8 that another would rely on the statement concealing
9 or omitting a material fact. Five, whether Marilyn
10 Seskin relied on the statement concealing or
11 omitting a material fact, and if so, six, whether
12 the reliance on the statement concealing or
13 omitting a material fact was a legal cause of
14 Marilyn Seskin's cancer.

15 On these claims for conspiracy to fraudulently
16 conceal, Marilyn Seskin may have relied on a
17 statement concealing or omitting a material fact,
18 even though the concealed or omitted material fact
19 could have been discovered if Marilyn Seskin had
20 made an investigation, but not if Marilyn Seskin
21 knew the statement concealed or omitted a material
22 fact, or that the concealed or omitted material
23 fact was obvious to her.

24 A material fact -- on page 22 -- is one that
25 is of such importance that Marilyn Seskin would not

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4034

1 have purchased talc-based Johnson's Baby Powder,
2 but for the false statement.

3 Page 23. If your verdict is for the
4 defendants, you will not consider the matter of
5 damages. But if the greater weight of the evidence
6 supports one or more of the plaintiff's claims, you
7 should determine and write on the verdict form in
8 dollars the total amount of loss, injury, or damage
9 which the greater weight of the evidence shows that
10 Bob Sugarman sustained as a result of Marilyn
11 Seskin's injury and death, including any damage
12 that the plaintiff is reasonably certain to incur
13 or experience in the future.

14 Page 24. In determining any damages to be
15 awarded to the plaintiff as Marilyn Seskin's
16 surviving spouse, you shall consider certain
17 elements of damage for which there is no exact
18 standard for fixing and compensating -- I'm sorry,
19 fixing the compensation to be awarded. Any such
20 award should be fair and just in light of the
21 evidence regarding the following elements: Bob
22 Sugarman's loss of Marilyn Seskin's companionship

23 and protection, and his mental pain and suffering
24 as a result of Marilyn Seskin's cancer and death,
25 bob Sugarman's loss by reason of Marilyn Seskin's

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4035

1 injury and death, of Marilyn Seskin's support and
2 services.

3 In evaluating past and future loss of support
4 and services, you shall consider Bob Sugarman's
5 relationship to Marilyn Seskin and the replacement
6 value of Marilyn Seskin's services, medical
7 expenses due to Marilyn Seskin's cancer and death
8 paid by Bob Sugarman or her estate.

9 There is an additional claim in this case that
10 you must decide. If you find for the plaintiff and
11 against Johnson & Johnson or LTL Management, you
12 must decide whether, in addition to compensatory
13 damages, punitive damages are warranted as
14 punishment to Johnson & Johnson or LTL Management
15 and as a deterrent to them.

16 Plaintiff claims that punitive damages should
17 be awarded against Johnson & Johnson or LTL
18 Management for their conduct in designing

19 talc-based Johnson's Baby Powder, failing to warn
20 about the risk of talc-based Johnson's Baby Powder,
21 fraudulently and negligently misrepresenting the
22 safety of talc-based Johnson's Baby Powder, and
23 conspiring to conceal information about the safety
24 of talc-based Johnson Johnson's Baby Powder.

25 Punitive damages are warranted against Johnson

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4036

1 & Johnson or LTL Management if you find by clear
2 and convincing evidence that Johnson & Johnson or
3 LTL Management were guilty of intentional
4 misconduct or gross negligence, which was a
5 substantial cause of loss, injury, or damage to the
6 plaintiff. Under those circumstances, you may, in
7 your discretion, award punitive damages against
8 Johnson & Johnson or LTL Management. If clear and
9 convincing evidence does not show such conduct by
10 Johnson & Johnson or LTL Management, punitive
11 damages are not warranted against one or both of
12 them.

13 Intentional misconduct means that Johnson &
14 Johnson or LTL Management had actual knowledge of

15 the wrongfulness of the conduct, and that there was
16 a high probability of injury or damage to the
17 plaintiff, and despite that knowledge, it
18 intentionally pursued the course of conduct
19 resulting in injury or damage.

20 I'm on page 26. Gross negligence. It's only
21 a few more pages.

22 Gross negligence means that Johnson & Johnson
23 or LTL Management's conduct was so reckless or
24 wanton in care that it constituted a conscious
25 disregard or indifference to the life, safety, or

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4037

1 rights of persons exposed to such conduct. Clear
2 and convincing evidence differs from the greater
3 weight of the evidence in that it is more
4 compelling and persuasive.

5 As I have already instructed you, greater
6 weight of the evidence means the more persuasive
7 and convincing force and effect of the entire
8 evidence in the case. Clear and convincing
9 evidence is evidence that is precise, explicit, not
10 lacking in confusion, and of such weight it that

11 produces a firm belief or conviction without
12 hesitation about the matter at issue.

13 If you decide that punitive damages are
14 warranted against Johnson & Johnson or LTL
15 Management, then you must decide the amount of
16 those punitive damages, if any, to be assessed as
17 punishment against Johnson & Johnson or LTL
18 Management, and as a deterrent to them or others.
19 This amount would be in addition to the
20 compensatory damages you have previously awarded.

21 In making this determination, you should
22 decide any disputed factual issues by the greater
23 weight of the evidence. In making this
24 determination, you should consider the following:
25 One, the nature, extent, and degree of misconduct

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4038

1 and the related circumstances including the
2 following: A, whether the wrongful conduct was
3 motivated solely by unreasonable financial gain; B,
4 whether the unreasonable dangerous nature of the
5 conduct, together with the high likelihood of
6 injury resulting from the conduct, was actually

7 known by Johnson & Johnson or LTL Management; C,
8 whether at the time of the loss, injury, or damage,
9 Johnson & Johnson or LTL Management had a specific
10 intent to harm the plaintiff, and the conduct of
11 Johnson & Johnson or LTL Management did, in fact,
12 harm him, and to the financial resources of Johnson
13 & Johnson and LTL Management.

14 You may, in your discretion, decline to assess
15 punitive damages. You may assess punitive damages
16 against one defendant and not the other, or against
17 more than one defendant. Punitive damages may be
18 assessed against different defendants in different
19 amounts.

20 Page 28. Punitive damages cannot be awarded
21 to punish and deter conduct that had no direct
22 relation to the plaintiff's alleged harm. When
23 evaluating punitive damages, however, you may
24 consider harm to others for the purpose of
25 determining whether the defendants' conduct was

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4039

1 reprehensible. A defendant may be punished for the
2 conduct that harmed the plaintiff, but not for the

3 impact of its alleged misconduct on other persons
4 who may bring lawsuits of their own in which other
5 juries can resolve their claims.

6 The amount of punitive damages you award, if
7 any, must bear a reasonable relationship to any
8 compensatory damages you have awarded to the
9 plaintiff. This is the law that you must follow in
10 deciding this case.

11 I'm on page 30 now. I'm going down to the
12 second paragraph on page 30.

13 During your deliberations, jurors must
14 communicate about the case only with one another,
15 and only when all jurors are present in the jury
16 room. You will have in the jury room all of the
17 evidence that was received during the trial. In
18 reaching your decision, do not do any research your
19 own or as a group. Do not use dictionaries, the
20 internet, or any other reference materials.

21 Do not investigate the case or conduct any
22 experiments. Do not visit or view the scene of any
23 events involved in the case or look at any maps or
24 pictures on the internet. If you happen to pass by
25 the scene, do not stop or investigate.

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4040

1 All jurors must see and hear the same evidence
2 at the same time. Do not read, listen to, or watch
3 any news accounts of this trial. You are not to
4 communicate with any person outside the jury about
5 this case. Until you have reached a verdict, you
6 must not talk about this case in person or through
7 the telephone, writing, or electronic
8 communications such a blog, Twitter, email, text
9 message, or any other means.

10 Do not contact anyone to assist you, such as a
11 family accountant, doctor, or lawyer. These
12 communication rules apply until I discharge you at
13 the end of the case. If you happen to become aware
14 of any violation of these instructions or any other
15 instructions that I have given you in this case,
16 you must tell me by giving a note to the bailiff.

17 Any notes that you have taken during the trial
18 may be taken to the jury room for your use during
19 your discussions. Your notes are simply an aid to
20 your own memory, and neither your notes, nor those
21 of any other juror, are binding or conclusive.

22 Your notes are not a substitute for your own
23 memory -- page 31 -- or that of any other jurors'.

24 Instead, your verdict must result from the
25 collective memory and judgment of all jurors based

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4041

1 on the evidence and testimony presented during the
2 trial. At the conclusion of the trial, the bailiff
3 will collect your notes, which will be immediately
4 destroyed. No one will ever read your notes.

5 In reaching your verdict, do not let bias,
6 sympathy, prejudice, public opinion or any other
7 sentiment for or against any party to influence
8 your decision. Your verdict must be based on the
9 evidence that has been received and the law on
10 which I have instructed you.

11 Reaching a verdict is exclusively your job. I
12 cannot participate in that decision in any way.
13 You should not guess what I think your verdict
14 should be from something that I may have said or
15 done. You should not think I prefer one verdict
16 over another. Therefore, in reaching your verdict
17 you shall not consider anything that I have said or
18 done except for my specific instructions to you.

19 Pay careful attention to all the instructions

20 I gave you, for that is the law you must follow.
21 You will have a copy of these instructions when you
22 go to the jury room and begin your deliberations.
23 All the instructions are important and you must
24 consider all of them together. There are no other
25 laws that apply to this case, and even if you do

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4042

1 not agree with these laws, you must use them in
2 reaching your decision in this case.
3 When you go into the jury room, the first
4 thing you should do is choose a presiding juror to
5 act as the foreperson during your deliberations.
6 The foreperson should see to it that your
7 discussions are orderly and that everyone has a
8 fair chance to be heard. It is your duty to talk
9 with one another in the jury room and to consider
10 the views of each juror.
11 Each of you must decide the case for
12 yourselves, but only after you have considered the
13 evidence with the other members of the jury. Feel
14 free to change your mind if you are convinced that
15 your position should be different. You should all

16 try to agree, but do not give up your honest
17 beliefs just because the others think differently.
18 Keep an open mind so that you and your fellow
19 jurors can easily share ideas about the case.

20 I will give you a verdict form with questions
21 that you must answer. I have already instructed
22 you on the law that you are to use in answering
23 these questions. You must follow my instructions
24 and the form carefully.

25 You must consider each question separately.

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4043

1 Please answer the questions in the order that they
2 appear on the form. After you answer a question,
3 the form tells you what to do next.

4 I'm not going over the form because the
5 lawyers already put it up there and they went
6 through it from the beginning to the end with you.
7 It doesn't make sense for me to go over it again
8 with you.

9 Your verdict must be unanimous; that is, your
10 verdict must be agreed to by each of you. When you
11 have agreed on your verdict, your foreperson must

12 sign and date and return -- I'm sorry -- must write
13 the date and sign it at the bottom and return the
14 verdict to the bailiff, which is not what you do.

15 All right, here is what has to happen: One,
16 it is 5:00. You are going to have to come back on
17 Monday, okay? That goes without saying. So I'm
18 not taking your phones or anything like that.
19 We'll have a copy of the instructions for each of
20 you, okay?

21 Now, you've heard everything you're going to
22 hear. There's no more instructions and there is no
23 more communication. Everything that we do from
24 this point has to be in writing. You have notepads
25 there.

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4044

1 When you go into the jury room, you have to --
2 anything you want to say to us, you have to write
3 on your note pad, okay? And when you have a
4 verdict -- and this is the important part: When
5 you have a verdict, this form that you go through
6 and you fill out, whoever the foreperson is, you
7 sign it, you date, you fold it in half, okay?

8 It's filled out, it's complete, you fold it in
9 half, but you hang onto it. You don't hand it to
10 anybody through that door. But you would need to
11 communicate with us that you've reached a verdict
12 and you are ready to come into the courtroom.

13 So on a separate sheet of paper, you write,
14 "We're done." Then you knock on the door, Brandon
15 is seated right outside the door. You'll just see
16 his hand. You put the note in his hand -- not the
17 verdict form. You put the note that says you're
18 done in his hand.

19 Foreperson, you bring this to the courtroom
20 when you come in. The lawyers want to see you hand
21 this to Brandon, Brandon hands it to me, and I
22 publish it, okay? You can't hand this through the
23 door.

24 What time would you like to come back on
25 Monday? Now that you are deliberating, it's really

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1 up to you because how much time you take to
2 deliberate is up to you.

3 JUROR: I think 9:30.

4 THE COURT: Same time? 9:30. We'll have you
5 come back 9:30. You don't have to pack a lunch
6 unless you have certain sensibilities to. We will
7 order you lunch while you are deliberating and I
8 will tell you -- okay, folks, now you have all the
9 instructions that you need.

10 What is your name?

11 JUROR: Kevin Murphy.

12 THE COURT: You-all agree, right?

13 MS. BROWN: Yes.

14 THE COURT: Mr. Murphy, you were juror number
15 seven. We can only send six jurors in the back to
16 deliberate. So you, sir, do not have to come back
17 on Monday, okay? So you can just leave everything
18 right there on the chair. Thank you. And if you
19 have -- if you need anything, Brandon will be there
20 to assist you.

21 JUROR: Am I on Jury Duty, the TV show?

22 THE COURT: Okay, folks. Here is what we are
23 going to do: We are done for the day. Hand your
24 notepads and your jury instructions to Brandon on
25 your way out. See you at 9:30.

1 I want to give you one more disclaimer before
2 you leave. You cannot -- remember I told you this
3 every day when you're leaving, but it's even more
4 important now because you've heard all the
5 evidence, you've been instructed as to the law, but
6 you can't talk to each other. You can't call each
7 other over the weekend and say, "What do you
8 think?"

9 The only time you can discuss this case is
10 when all six of you are in that jury room together.
11 No research, nothing. I need you to stick to that.
12 No social media.

13 We'll see you Monday morning at 9:30. Have a
14 good weekend.

15 You-all can be seated. Be comfortable. There
16 is another juror in there, we have to give them a
17 minute.

18 (The jurors exited the courtroom.)

19 THE COURT: Any objection other than what has
20 already been preserved to the verdict form as
21 submitted. Plaintiff?

22 MR. OLIVER: No further objections, Your
23 Honor.

24 THE COURT: Defense?

25 MS. BROWN: No.

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1 THE COURT: Any objection to the jury
2 instructions as read, other than the objections
3 that have already been made part of the record?

4 MR. OLIVER: No for plaintiff.

5 MS. BROWN: No, Your Honor.

6 THE COURT: All right. See you-all
7 tomorrow -- see you-all Monday morning at 9:30.
8 Before you leave -- well, I won't make you do this
9 tonight, but Monday morning at 8:30, you have to be
10 here to make sure you've gone through all the
11 exhibits and you make sure only those exhibits that
12 were admitted into evidence go back to the jury,
13 and any exhibits that were not admitted do not go
14 back to the jury.

15 I will not grant a mistrial if you let an
16 exhibit go back that should not go back there. And
17 I need you-all to state on the record you've gone
18 through the exhibits, and all those exhibits that
19 are there should go back to the jury. You've
20 reviewed them, they all should go back to the jury.

21 And that's at 8:30.

22 Or if you don't think you need that long to do
23 it, you can come at 9:00, but when the jury is
24 here, I need to know that all that has already been
25 done. And I don't have a motion calendar, so we'll

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1 be able to get started as soon as all the jurors
2 arrive.

3 Anything else that's left we can take up after
4 we do the -- after you-all do the exhibits. The
5 Court will be in recess. Thank you so much for
6 everything. I will see you-all Monday at 9:30.

7 (The proceedings recessed at 5:09 p.m.)

8 (Continued in Volume XVII.)

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CERTIFICATE

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I, CHRISTINE SAVOUREUX-MARINER, Florida

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Professional Reporter, certify that I was authorized

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to and did stenographically report the foregoing

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proceedings and that this transcript is a true

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record of the proceedings before the Court.

8

I further certify that I am not a

9

relative, employee, attorney, or counsel for any of

10

the parties, nor am I a relative or employee of any

11

of the parties' attorney or counsel connected with

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the action, nor am I financially interested in the

13 action.

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Dated this 2nd day of March, 2024.

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CHRISTINE SAVOUREUX-MARINER
Florida Professional Reporter

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